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## TORTURING THE LAW

José E. Alvarez <sup>†</sup>

### I. INTRODUCTION

I accepted the invitation to address this symposium reluctantly. It is distressing that lawyers, whose lives are, after all, dedicated to establishing constraints on the exercise of arbitrary power, now find themselves addressing a topic that involves the ultimate exercise of arbitrary power over another human being. Lawyers—of all people—should not be addressing torture and cruel, inhuman, degrading treatment as if this were just another policy choice over which reasonable, civilized people can disagree.<sup>1</sup> Yet the

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<sup>†</sup> Hamilton Fish Professor of Law and Diplomacy, Columbia Law School; Visiting Scholar, Pace University School of Law. This is an expanded version of a keynote address presented at Case Western Reserve University School of Law on October 7, 2005. I am grateful to Nate Lipscomb for able research assistance, to Diane Amann, David Bowker, Scott Horton, Irma Russell, Mark Shulman, Gregory Shaffer, and Detlev Vagts for helpful comments. Remaining errors are, of course, entirely my own.

<sup>1</sup> I leave to another day the very serious question of the possible role of the Bush Administration torture memoranda in normalizing the use of torture as a legitimate policy tool. Some have suggested that the physical and sexual abuse of prisoners has for a long time taken place in U.S. prisons, even in the United States, and that such abuse, albeit not usually the subject of photographs published in the media, has long been tolerated, although not officially sanctioned. See, e.g., Fox Butterfield, *Mistreatment of Prisoners is Called Routine in U.S.*, N.Y. TIMES, May 8, 2004, at A11. Others contend, on the contrary, that there has been a pronounced change in the way torture and detainee abuse is viewed after 9/11, noting the abundant (and usually successful) deployment of torture now regularly depicted on recent television shows, usually in contexts involving variations on the “ticking bomb” scenario. It is argued that such depictions have acclimated Americans to the use of torture, at least in the context of the “war” on terrorism, and lessened the level of shock once associated with it. See, e.g., Adam Green, *Normalizing Torture, One Rollicking Hour at a Time*, N.Y. TIMES, May 22, 2005, § 2, at 34. Such cultural phenomena, along with the torture memoranda, may be producing a legally relevant change insofar as, for example, U.S. due process jurisprudence prohibits only official conduct that “shocks the conscience.” See, e.g., *Rochin v. California*, 342 U.S. 165 (1952). It may be that the American conscience may no longer be quite as shocked by some of the forms of maltreatment that are condoned by these memoranda. See, e.g., James Bacchus, *The Garden*, 28 FORDHAM INT’L L.J. 308, 314-15, 320 (2005) (noting that the abuses of Abu Ghraib were not uniformly condemned) (citing national polls indicating that more than one third of Americans indicated that torture was legitimate in some cases and only one third considered the abuses at Abu Ghraib to constitute “torture”). It may be relevant, in this respect that one of the infamous torture memoranda suggests that the relevant constitutional standard is what shocks the “contemporary conscience.” See Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations (Mar. 6, 2003), *reprinted in* THE

actions of the United States government and its allies in the "War on Terrorism" appear to have made it necessary to revisit that 'hostis humanis generis'<sup>2</sup>—the torturer.

As that astonishing paper trail of apparent complicity in torture, *The Torture Papers*,<sup>3</sup> indicates, we have discovered that the torturer is no longer just the alien subject of the Alien Tort Claims Act ("ATCA"), that outsider to the civilized rule of law operating in some Third World totalitarian shore that we condemn so easily in large part because it makes us feel so superior. The torturer is now us—distinguished, accomplished, highly credentialed public servants and high government officials, current or former professors of law at famous law schools, civil servants in the White House Counsel's Office, the U.S. Department of Defense, or the Office of Legal Counsel ("OLC") within the U.S. Department of Justice, even one who has since become a federal judge. None of these can be dismissed as "heathens" or strangers to American morals, indeed some of the major players in *The Torture Papers* are known to be devout Christians.<sup>4</sup> The high-level torturers that are my subject are, in the words of Stephen Sondheim, our "princes"<sup>5</sup>—members of an elite club of lawyers who attend conferences like these.

When legal princes are complicit in torture in rule of law states such as the United States, their actions usually take a different shape than in, for example, Filartiga—where the accused Inspector General of Police of Asuncion, Paraguay himself tortured and killed without official warrant in formal Paraguayan law.<sup>6</sup> When our high-level torturers act they do not do so by ignoring the law or acting extra-legally but by systematic and rea-

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TORTURE PAPERS: THE ROAD TO ABU GHRAIB 286 (Karen J. Greenberg & Joshua L. Dratel eds., 2005) [hereinafter Memo 25]. Whether or not a change in the broader culture has occurred, the use of torture has now become a much discussed potential policy tool in scholarship, see, e.g., Alan M. Dershowitz, *The Torture Warrant: A Response to Professor Strauss*, 48 N.Y.L. SCH. L. REV. 275 (2004) (advocating the issuance of torture warrants in some cases), and even in Congress. See, e.g., H.R. 10, 108th Cong. (2004). As originally introduced by Rep. Dennis Hastert, this bill would have removed all protections from transfer of those suspected of terrorism even when the transfer is intended to permit interrogation under torture in foreign states.

<sup>2</sup> *Filartiga v. Pena-Irala*, 630 F.2d 876, 878, 890 (2d Cir. 1980).

<sup>3</sup> TORTURE PAPERS, *supra* note 1. All the memoranda cited in this essay are contained in *The Torture Papers* and follow the numbered sequence in that volume.

<sup>4</sup> See, e.g., Karen J. Greenberg, *From Fear to Torture*, in TORTURE PAPERS, *supra* note 1, at xvii, xix (noting deeply religious beliefs of Bybee and Ashcroft). See also Adam Liptak, *Author of '02 Memo on Torture: 'Gentle' Soul for a Harsh Topic*, N.Y. TIMES, June 24, 2004, at A1 (describing, *inter alia*, Bybee's enthusiasm for the kazoo).

<sup>5</sup> Stephen Sondheim, *Liaisons*, from A LITTLE NIGHT MUSIC (1973).

<sup>6</sup> *Filartiga*, 630 F.2d at 878.

soned misinterpretations of the law.<sup>7</sup> This is not torture outside the law but, ostensibly, under it. Graduates of Harvard or Yale Law Schools and former clerks of the U.S. Supreme Court usually do not themselves strap people down on water boards, attach electric wires to their appendages, handcuff them in “stress” positions that cause them to suffocate, withhold vital medical treatment, or threaten naked detainees with attack dogs.<sup>8</sup> Their positions in society give them the luxury to write legal memoranda that authorize or permit *other* people to do these things.<sup>9</sup> Indeed, in our legalistic culture they usually have to. At least since Watergate, our lower level operatives have learned that they risk being left high and dry unless they secure legal au-

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<sup>7</sup> See Greenberg, *supra* note 4, at xviii. There is no evidence that any of the writers of the Administration’s torture memoranda *themselves* engaged in the physical act of torture or of inflicting cruel, inhuman or degrading treatment.

<sup>8</sup> This enumerates only some of the tactics reported to be deployed by U.S. personnel in the course of interrogation or merely in the course of detention, particularly since September 11th and not only in Abu Ghraib or Guantánamo. See, e.g., Jess Bravin & Gary Fields, *How Do U.S. Interrogators Make a Captured Terrorist Talk?*, WALL ST. J., Mar. 4, 2003, at B1; Don Van Natta, Jr., *Questioning Terror Suspects in a Dark and Surreal World*, N.Y. TIMES, Mar. 9, 2003, § 1, 14; Dana Priest & Barton Gellman, *U.S. Decries Abuse but Defends Interrogations*, WASH. POST, Dec. 26, 2002, at A1. See also John T. Parry, *What is Torture, Are We Doing It, and What If We Are?*, 64 U. PITT. L. REV. 237 (2003). None of the enumerated tactics would necessarily constitute prohibited “torture” as narrowly defined by the most detailed of the memoranda in *Torture Papers* that purport to define the term. See *infra* note 10.

<sup>9</sup> As is further addressed below, the principal memoranda addressing permissible interrogation techniques drafted by Administration lawyers in 2002-2003 take such a narrow view of the ban on torture and such an expansive view of permissible defenses for those accused of torture that they appear to condone methods of interrogation by U.S. officials or agents that would be generally regarded as torture by international authorities such as the Human Rights Committee. See, e.g., Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep’t of Justice, to Alberto R. Gonzales, Counsel to the President, Standards of Conduct for Interrogation under 18 U.S.C. §§ 2340-2340A (Aug. 1, 2002), *reprinted in* TORTURE PAPERS, *supra* note 1, at 172 [hereinafter Memo 14] (concluding that prohibited torture requires either mental harm producing lasting psychological harm or severe pain of intensity comparable to death or organ failure). As is also further addressed below, the Administration memoranda also take a very narrow view of the reach of international and national prohibitions on the use of torture outside of U.S. territory or by non-U.S. personnel. See generally Association of the Bar of the City of New York & Center for Human Rights and Global Justice, New York University School of Law, *Torture by Proxy: International and Domestic Law Applicable to “Extraordinary Renditions”* (Oct. 29, 2004), available at <http://www.nyuhr.org/docs/TortureByProxy.pdf> [hereinafter Torture by Proxy] (discussing the U.S. practice of transferring individuals to a foreign state “in circumstances that make it more likely than not that the individual will be subjected to torture or cruel, inhuman, or degrading treatment.”). See also discussion of Memorandum from Jack Goldsmith, Assistant Attorney Gen., U.S. Dep’t of Justice, to William H. Taft, IV et al., Regarding Draft Memorandum to Alberto R. Gonzales, Counsel to the President, Re: Permissibility of Relocating Certain “Protected Persons” from Occupied Iraq (Mar. 19, 2004), *reprinted in* TORTURE PAPERS, *supra* note 1 [hereinafter Memo 28].

thorizations for their dirty deeds.<sup>10</sup> This means that the commission of torture by those working on behalf of the United States entails not just physically demeaning acts (to both torturer and victim) but a second degradation: torturing<sup>11</sup> the law so that everyone can feel clean, or at least insulated from the risk of prosecution, even though they are all, both high government official and low level operative, in my view knee-deep in blood. The commission of torture by U.S. government officials usually requires torturing the law.<sup>12</sup>

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<sup>10</sup> See, e.g., Michael Hirsch et al., *A Tortured Debate*, NEWSWEEK, June 21, 2004, at 50 (indicating that the CIA, remembering how it had been blamed for prior covert plots, "made sure that it had explicit, written authorization from lawyers and senior policymakers before using new interrogation techniques").

<sup>11</sup> This reflects a common figurative use of the term "torture" and obviously not the legal use, which is limited to an act done to another human being. To "torture" a word or the law means to extremely distort its meaning, as to use a term to mean its opposite in Orwellian fashion. See, e.g., *Terry v. Ohio*, 392 U.S. 1, 16 (1968): "[I]t is nothing less than sheer torture of the English language to suggest that a careful exploration of the outer surfaces of a person's clothing all over his or her body in an attempt to find weapons is not a 'search,'" cited in Jeremy Waldron, *Torture and Positive Law: Jurisprudence for the White House*, 105 COLUM. L. REV. 1681, 1698 n.79 (2005). This figurative use of the word "torture" does not lessen its value or risk confusion. When I suggest, as I do throughout this essay, that the Administration memoranda "torture" the law no one could possibly mistake this use for what the term means in international human rights law or international humanitarian law. Nor is my use of the term casual. I am not simply arguing that the torture memoranda "misconstrue" or "misinterpret" the law, I am suggesting that many of the arguments presented in these memoranda are so extremely at odds with the actual law they purport to be interpreting that a more extreme perversion of the law is involved. I am also suggesting that, as Jeremy Waldron has recently argued, the arguments in these memoranda are so fundamentally out of bounds with what he calls central "archetypes" of American and international law that they constitute nothing less than a torture of the rule of law itself. See *id.*

<sup>12</sup> To this extent, I disagree with suggestions that abuses at Abu Ghraib were either the unauthorized actions of a few "bad apples" or the product of an unintentionally lawless environment due to understandable confusion over applicable law in the fog of war. Although the abusers at Abu Ghraib indeed acted lawlessly, their actions appear to be the predictable consequence of a series of high level government decisions, reflected in the memoranda contained in *The Torture Papers* that appear intended to remove many of the constraints on the treatment of those captured during the U.S.'s ongoing "war" on terrorism. See, e.g., Mark Danner, *The Logic of Torture*, N.Y. REV. OF BOOKS, June 24, 2004; David W. Bowker, *Unwise Counsel: The War on Terrorism and the Criminal Mistreatment of Detainees in U.S. Custody*, in *THE TORTURE DEBATE IN AMERICA* 183, 193-98 (Karen J. Greenberg ed., 2006). The memoranda in the *The Torture Papers* did not get the law wrong because of confusion about which legal regime to apply. The text of the memoranda, when considered alongside the public statements of Bush Administration officials, suggest conscious reinterpretations of existing law, both national and international, intended to respond to alleged "new" circumstances faced by the United States in its new "war." See Memorandum from Alberto R. Gonzales, Counsel to the President, to George W. Bush, President, Decision Re Application of the Geneva Convention on Prisoners of War to the Conflict with Al Qaeda and the Taliban (Jan. 25, 2002), reprinted in *TORTURE PAPERS*, *supra* note 1, at 118 [hereinafter Memo 7] (recommending that the Geneva Conventions be determined not to apply to a "new para-

What follows is a summary of the principal ways the Bush Administration's infamous torture memoranda—especially but not only those authored by then Deputy Assistant Attorney General John Yoo and then Assistant Attorney General Jay Bybee—twisted, in small and large ways, international law.<sup>13</sup>

## II. TORTURING THE LAW OF TREATIES

The torture memoranda misconstrue or ignore the various U.S. treaty obligations that prohibit torture and inhuman treatment in various contexts, including the 1949 Geneva Conventions, the International Covenant on Civil and Political Rights ("ICCPR"), the Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment ("Torture Convention"), the American Declaration on the Rights and Duties of Man (incorporated as a binding obligation on the U.S. through its adherence to the Organization of American States ("OAS") Charter), and the Convention relating to the Status of Refugees ("Refugee Convention").<sup>14</sup>

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digm" of warfare involving Al Qaeda or the Taliban). Nor is it plausible to argue that the lawyers responsible for these memoranda were simply ill-informed. There was no scarcity of governmental insiders, including then Secretary of State Colin Powell, then U.S. State Department Legal Adviser William H. Taft IV, and numerous military lawyers, who were under no confusion as to which legal regime applied or when, but whose legal advice was ignored by the drafters of the torture memoranda. *See, e.g.,* John Barry et al., *The Roots of Torture*, NEWSWEEK, May 24, 2004, at 26 (reporting objections by Taft, Powell, and military lawyers). *See also* Memorandum from Colin L. Powell, Sec'y of State, U.S. Dep't of State, to Alberto R. Gonzales, Counsel to the President, Draft Decision Memorandum for the President on the Applicability of the Geneva Convention to the Conflict in Afghanistan (Jan. 26, 2002), reprinted in TORTURE PAPERS, *supra* note 1, at 122 (presenting a more balanced listing of the pros and cons of applying Geneva law to the conflict in Afghanistan). This is not to suggest, however, that all the torture memoranda clearly acknowledge that their conclusions constitute departures from existing law.

<sup>13</sup> Much of what follows synthesizes or adds detail to critiques made by others. *See, e.g.,* Bacchus, *supra* note 1; Waldron, *supra* note 11; Harold Hongju Koh, *A World Without Torture*, 43 COLUM. J. TRANSNAT'L L. 641 (2005); Jordan J. Paust, *Executive Plans and Authorizations to Violate International Law Concerning Treatment and Interrogation of Detainees*, 43 COLUM. J. TRANSNAT'L L. 811 (2005); Diane Marie Amann, *Abu Ghraib*, 153 U. PA. L. REV. 2085 (2005).

<sup>14</sup> Geneva Convention Relative to the Treatment of Prisoners of War art. 3, Aug. 12, 1949, 6 U.S.T. 3316, 75 U.N.T.S. 135 [hereinafter Geneva III]; Geneva Convention Relative to the Protection of Civilian Persons in Time of War art. 3, Aug. 12, 1949, 6 U.S.T. 3516, 75 U.N.T.S. 287 [hereinafter Geneva IV]; *see also* common Article 3 Geneva III, *supra* note 14, art. 3; Geneva IV, *supra* note 14, art. 3; Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S. 85, [hereinafter Torture Convention]; International Covenant on Civil and Political Rights art. 7, Dec. 19, 1966, 999 U.N.T.S. 171 [hereinafter ICCPR]; Convention Relating to the Status of Refugees art. 33, July 28, 1951, 189 U.N.T.S. 150 [hereinafter Refugee Convention] (ban on refoulement); American Declaration of the Rights and Duties of Man, O.A.S. Res. XXX, arts. I & XXV, adopted by the Ninth International Conference of American States (1948).

The torture memoranda conclude that the relevant obligations on interrogation techniques in the third and fourth Geneva Conventions do not apply to Al Qaeda or Taliban detainees or to "unlawful combatants" generally.<sup>15</sup> As many critics have noted, these overbroad determinations ignore the differences between regular and irregular forces under Article 4(A)(1) and (2) of Geneva III, the plain meaning of Common Article 3, and the Article 5 requirement in Geneva III that in cases of doubt, determinations of Prisoner of War ("POW") status need to be made by a competent tribunal and not by the President acting alone.<sup>16</sup> The authors of the memoranda tend to treat the many Geneva provisions on point—from the requirement in Article 17 of Geneva III that prohibits any form of coercion against POWs to

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<sup>15</sup> See, e.g., Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., and Robert J. Delahunty, Special Counsel, U.S. Dep't of Justice, to William J. Haynes II, Gen. Counsel, Dep't of Defense, Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 9, 2002), reprinted in *TORTURE PAPERS*, *supra* note 1, at 38 [hereinafter Memo 4]; Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President, and William J. Haynes II, Gen. Counsel, Dep't of Def., Application of Treaties and Laws to al Qaeda and Taliban Detainees (Jan. 22, 2002), reprinted in *TORTURE PAPERS*, *supra* note 1, at 81 [hereinafter Memo 6]; Memo 7, *supra* note 12, at 118; Memo 25, *supra* note 1, at 241.

<sup>16</sup> See, e.g., ASS'N OF THE BAR OF THE CITY OF NEW YORK, COMM. ON INT'L HUMAN RIGHTS, COMM. ON MILITARY AFFAIRS AND JUSTICE, HUMAN RIGHTS STANDARDS APPLICABLE TO THE UNITED STATES' INTERROGATION OF DETAINEES (2004), <http://www.abcnyc.org/pdf/HUMANRIGHTS.pdf>; George H. Aldrich, *The Taliban, Al Qaeda, and the Determination of Illegal Combatants*, 96 AM. J. INT'L L. 891 (2002). Many experts in international humanitarian law, including some U.S. JAG lawyers, dispute the Administration's apparent determinations (1) that Afghanistan as a "failed state" was not entitled to the Geneva Conventions' protections or (2) that Taliban forces were not entitled to POW protection because these only extend to those individuals who meet the requisites identified in Article 4(A)(2) of Geneva III. Article 4(A)(1) of Geneva III would appear to extend POW status to all the "armed forces" of a party regardless of whether those conditions are satisfied and presumably the United States would insist on such protections even for uninformed U.S. forces. Further, even those who believe that the Taliban do not satisfy the requisites of Article 4, acknowledge that Article 5 of Geneva III requires a "competent tribunal" to determine doubts about POW status *when such individuals fall "into the hands of the enemy" and not years later*, after detainees who might have been entitled not to be interrogated because they were POWs have had their rights violated. Common Article 3 requires all persons not taking part in hostilities, including those who have laid down their arms, to be treated "humanely," not to be subjected to "cruel treatment" or "torture," and not to suffer "outrages upon personal dignity, in particular humiliating and degrading treatment." Notably, these protections, which obviously go beyond a right not to be tortured, are not dependent on POW status and a violation of this Article constitutes a "grave breach" or a war crime. Even some defenders of the Administration's conclusions with respect to the inapplicability of Geneva law appear to concede that there may be a difference between denying these protections to Al Qaeda fighters and denying these rights to the Taliban and all other "unlawful combatants." See, e.g., John Cornyn, *In Defense of Alberto R. Gonzales and the 1949 Geneva Conventions*, 9 TEX. REV. L. & POL. 213, 223 (2005) (defending the "core" conclusion that Al Qaeda fighters "have no legal right to special POW privileges.").

secure information to its Article 130 that makes inhuman treatment of POWs a war crime—as matters of “non-binding” international law that “could be cited to by other countries” and may therefore inform the Department of Defense’s “policy considerations.”<sup>17</sup>

One of the most detailed memoranda concerning the “requirements of international law” with respect to detainee interrogations dismisses the significance of the ICCPR in a single paragraph. It notes only that the U.S. has reserved on the relevant paragraph of that treaty such that the prohibition on cruel, inhuman, or degrading treatment or punishment means only whatever is barred under the Fifth, Eighth, or Fourteenth Amendments to the U.S. Constitution, that the Human Rights Committee can only consider allegations of non-compliance, and that the U.S. “has maintained consistently that the [ICCPR] does not apply outside the U.S.”<sup>18</sup> The authors of this Working Group Report do not address how the jurisprudence of the Human Rights Committee or the U.N.’s Human Rights Commission’s Special Rapporteur on Torture might affect the unreserved portion of Article 7 of the ICCPR (that is the meaning of “torture”), whether there are plausible arguments that the relevant provisions of the ICCPR (which, after all, reflect general customary international law) apply to places under effective U.S. control outside the territory of the U.S.,<sup>19</sup> or whether other possibilities exist for enforcement of ICCPR duties outside the Human Rights Committee, including use of the convention by U.S. courts in construing a statute under the Charming Betsy canon of construction, in other international fora, or in foreign courts.

Relevant obligations in OAS human rights instruments and the Refugee Convention are scarcely mentioned in this or other memoranda; there is no consideration of whether these instruments might suggest a broader conception of what constitutes banned torture or inhuman treatment and no discussion of whether these instruments might have extraterritorial

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<sup>17</sup> See, e.g., U.S. Dep’t of Def., Working Group Report on Detainee Interrogations in the Global War on Terrorism: Assessment of Legal, Historical, Policy, and Operational Considerations (Apr. 4, 2003), *reprinted in* TORTURE PAPERS, *supra* note 1, at 286, 336 [hereinafter Memo 26].

<sup>18</sup> Memo 25, *supra* note 1, at 243.

<sup>19</sup> The Working Group Report, Memo 25, *supra* note 1, does not address authorities that find that the rights in the ICCPR apply extraterritorially or during wartime. Cf. Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, 2004 I.C.J. 131, paras. 102-13 (July 9) (concluding that obligations under the ICCPR, the International Covenant on Economic, Social and Cultural Rights, and the Convention on the Rights of the Child apply to occupied territory); Human Rights Committee, General Comment No. 31, para. 10, UN Doc. CCPR/C/21/Rev.1/Add.13 (2004), [http://www.unhchr.ch/tbs/doc.nsf/\(Symbol\)/CCPR.C.21.Rev.1.Add.13.En?Opendocument](http://www.unhchr.ch/tbs/doc.nsf/(Symbol)/CCPR.C.21.Rev.1.Add.13.En?Opendocument) [hereinafter General Comment 31] (interpreting ICCPR to extend to “those within the power or effective control of the forces of a State Party acting outside its territory”).



effects and therefore impose duties on the United States when it acts abroad or on the high seas. There is also no consideration of whether the *selection* of detainees who would be subject to particularly aggressive forms of interrogation might implicate U.S. duties not to discriminate on the basis of religion or nationality under the International Convention on the Elimination of all Forms of Racial Discrimination ("Convention Against All Forms of Race Discrimination").<sup>20</sup>

But if the memoranda err mostly through omission with respect to U.S. treaty obligations, these sins pale in significance to the violence committed upon the Torture Convention. The Working Group Reports and the relevant Yoo/Bybee memoranda transmute the Convention *Against* Torture into the convention *for* certain kinds of torture and inhuman treatment, at least when it comes to actions taken outside U.S. territory.

The relevant memoranda contend that U.S. criminal law on point, as well as the U.S. "understandings" attached to the definition of torture in Article 1 of the Torture Convention, confirms what they assert is the plain meaning of the treaty: namely that it prohibits only the most extreme forms of intentionally inflicted harm, namely those causing the most severe kind of physical pain tantamount to death or organ failure or psychological forms of pressure that cause permanent or prolonged mental harm, and that this narrow ban applies only when interrogators specifically intend such harms but not when, for example, they are seeking information to defend the nation from harm.<sup>21</sup> The memoranda contend that the ban on even the most severe forms of harm, that is on acts that satisfy their narrow definition of torture, is subject to the defenses of necessity and self-defense and can be, in any case, countermanded by the President acting as Commander-in-Chief. The Torture Convention's injunctions against cruel, inhuman and degrading treatment are dismissed on the grounds of the U.S. reservation that equates these with U.S. constitutional strictures. Since these constitutional constraints, which are seen as limited to the due process clauses of the U.S. Constitution, are said not to apply to aliens outside the United States,

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<sup>20</sup> International Convention on the Elimination of All Forms of Racial Discrimination art. 1, *opened for signature* Mar. 7, 1966, 660 U.N.T.S. 195 (banning discrimination on the basis of, among other things, national or ethnic origin). Compare, for example, the discussion in the Altstoetter case of the "discriminatory nature" of German laws and policies, including the Night and Fog decree, as forming a pattern or plan of racial persecution. *United States v. Altstoetter* (The Justice Case), in 3 TRIALS OF WAR CRIMINALS BEFORE THE NUREMBERG MILITARY TRIBUNALS UNDER CONTROL COUNCIL LAW NO. 10 1063-81 (1951) [hereinafter Altstoetter]. See also Parry, *supra* note 8, at 255-57 (discussing the impact of race on police enforcement within the United States).

<sup>21</sup> See Memo 14, *supra* note 9, at 172. See also Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., U.S. Dep't of Justice, to Alberto R. Gonzales, Counsel to the President (Aug. 1, 2002), *reprinted in* TORTURE PAPERS, *supra* note 1, at 218 [hereinafter Memo 15]; Memo 25, *supra* note 1, at 241; Memo 26, *supra* note 17.

the result is that the Torture Convention, in the view of the memoranda writers, does nothing to preclude torture or cruel, inhuman or degrading treatment at least when the U.S. acts against aliens abroad.<sup>22</sup> All of these contentions are belied by the text, context, and negotiating history of this treaty and the last, as noted below, is at best an unduly narrow construction of the U.S. Constitution itself.

As even the Executive was compelled to acknowledge after Abu Ghraib, prohibited torture need not require the severity of pain or mental harm described in these memoranda.<sup>23</sup> Moreover, any reading of the “specific intent” language included in the U.S. understandings to the Torture Convention or its criminal statute as permitting a criminal prosecution only in the rare case of a Marquis de Sade driven only by the desire to inflict the most severe form of pain would suggest that the U.S. never really adhered to the Torture Convention as it was understood by all. It is also probable that most of the world would regard such a purported modification of the treaty’s terms as totally at odds with its object and purpose, which was designed after all precisely to prevent torture and inhumane, degrading treatment when seeking information in the course of interrogations.<sup>24</sup> The excuses asserted in these memoranda—self-defense, necessity, Presidential

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<sup>22</sup> See, e.g., Koh, *supra* note 13, at 652, n.46 (discussing the interpretation of the torture memoranda by a Justice Department lawyer). *But cf.* Torture by Proxy, *supra* note 9, at 47-48 (discussing possibility that the Torture Convention was intended to apply to all territory under military occupation as well as to any other territory over which a state has “factual control” and noting that the United States did not make a formal reservation to the Torture Convention’s territorial scope).

<sup>23</sup> Memorandum from Daniel Levin, Acting Assistant Attorney Gen., U.S. Dep’t of Justice, to James B. Comey, Acting Assistant Attorney Gen., U.S. Dep’t of Justice, Legal Standards Applicable Under 18 U.S.C. §§ 2340-2340A (Dec. 30, 2004), available at <http://www.justice.gov/olc/dagmemo.pdf> [hereinafter Comey Memo]. For a more detailed critique of the Bybee/Yoo memorandum’s treatment of the severity of physical or mental pain needed to constitute “torture,” see, e.g., Linda M. Keller, *Is Truth Serum Torture?*, 20 AM. U. INT’L L. REV. 521, 572-588 (2005).

<sup>24</sup> See Memo 14, *supra* note 9, at 174, 175 (“[I]nfliction of such pain must be the defendant’s precise objective.”) (“[E]ven if the defendant knows that severe pain will result from his actions, if causing such harm is not his objective, he lacks the requisite specific intent even though the defendant did not act in good faith.”). The memoranda ignore the complex law relating to permissible treaty reservations. The memoranda wrongly conflate “understandings” with “reservations” that are intended to modify the terms of a treaty and are notified as such to all treaty parties. See Memo 14, *supra* note 9, at 184 n. 7 (suggesting that the U.S. “understanding” to Article 1 of the Torture Convention “represents a modification of the obligations undertaken by the United States”). Although the U.S. understandings to Article 1 of the Torture Convention are extensively discussed and relied upon, the Human Rights Committee’s position regarding reservations that reduce the meaning of a treaty to whatever the reserving state or its courts believes national law means from time to time is not discussed, nor is its position with respect to reservations that violate the object and purpose of a treaty. See Human Rights Committee, General Comment No. 24, U.N. Doc. CCPR/C/21/Rev.1/Add.6 (1994).

war powers—ignore the absolute nature of the ban on torture in the Torture Convention's Article 2,<sup>25</sup> as well as the legitimate scope of self-defense and necessity under international law.<sup>26</sup>

Although the question presented to the authors of these memoranda is a general one, namely the "standards of conduct" applicable to custodial interrogations under the law, including treaty law, the Yoo/Bybee memoranda focus almost entirely on the prospect of *criminal* prosecutions under U.S. federal and military law. Driven by an apparent need to reassure U.S. officials that they need not fear being criminally prosecuted so long as they stop short of causing death or serious organ damage (and possibly not even then should the President pen a directive to the contrary), the memoranda writers transform the Torture Convention's Article 16—which requires states to prevent other acts of cruel, inhumane or degrading treatment but does not require such behavior to be criminalized or to result in civil penalties—into a license to commit cruel, inhumane or degrading acts on detainees because these are not, in their view, criminal torture.<sup>27</sup> Having defined away a great deal of heinous acts because these are not "torture" narrowly defined, the memoranda authors conveniently do not dwell on the other onerous duties imposed under the rest of the treaty. Thus memoranda that are supposedly meant to consider all the legal constraints on interrogating suspects manage to ignore what it means for the U.S. to have an international treaty obligation to take "effective legislative, administrative, judicial" measures to prevent torture (Article 2);<sup>28</sup> not to expel, return or extradite persons to places where they might be tortured (Article 3);<sup>29</sup> to criminalize not just acts of torture but the attempts and complicity (Article 4);<sup>30</sup> to establish jurisdiction over such criminal acts in any territory under its jurisdiction (Article 5);<sup>31</sup> to prosecute or extradite

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<sup>25</sup> Article 2(2): "No exceptional circumstances whatsoever, whether a state of war or a threat of war, internal political instability or any other public emergency, may be invoked as a justification for torture." Torture Convention, *supra* note 14, art. 2(2).

<sup>26</sup> See Vienna Convention on the Law of Treaties art. 31(3)(c), May 23, 1969, 1155 U.N.T.S. 331 [hereinafter Vienna Convention] (permitting treaty interpreters to consider "relevant rules of international law" along with treaty context). See *infra* note 28 for discussion of these defenses under international criminal law.

<sup>27</sup> See, e.g., Memo 14, *supra* note 9, at 185 (arguing that the distinction made in Article 16, which reserves the stigma of criminalization to acts of torture, "makes clear that torture is at the farthest end of impermissible actions" as distinct from cruel, inhumane or degrading treatment. This fails to mention that Geneva IV, although it stops short of requiring criminal or civil liability, still requires states to prevent all such acts under Articles 10-13).

<sup>28</sup> Torture Convention, *supra* note 14, art. 2.

<sup>29</sup> *Id.* art. 3.

<sup>30</sup> *Id.* art. 4.

<sup>31</sup> *Id.* art. 5.

alien torturers in its territory (Articles 6-7);<sup>32</sup> to assist other states in their criminal prosecutions of torturers (Article 9);<sup>33</sup> to prevent acts of torture through the training of all civil and military personnel (Article 10);<sup>34</sup> to keep interrogation rules under systematic review (Article 11);<sup>35</sup> to conduct prompt, impartial investigations whenever there are reasonable grounds to believe torture has been committed (Article 12);<sup>36</sup> to provide a prompt, impartial civil remedy to torture victims (Articles 13-14);<sup>37</sup> or to ban the use of statements made in the course of torture (Article 15).<sup>38</sup> Questions such as whether these treaty duties ought to inform the scope of existing U.S. law, much less whether existing U.S. laws and policies fully implement the treaty, are deemed beneath notice. The memoranda also say little about the risks of civil liability *under international law* either to the nation or the perpetrator should any of these *additional* duties be breached.<sup>39</sup> And while one of the most detailed memorandum on point, Bybee's of August 1, 2002, purports to address relevant "international decisions" such as those rendered by the European Court of Human Rights, the few non-U.S. precedents mentioned are carefully chosen and selectively cited only to reflect the author's conclusion concerning the severity of pain needed to constitute torture.<sup>40</sup> In this respect, as in most others, these memoranda are advocacy

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<sup>32</sup> *Id.* arts. 6-7.

<sup>33</sup> *Id.* art. 9.

<sup>34</sup> *Id.* art. 10.

<sup>35</sup> *Id.* art. 11.

<sup>36</sup> *Id.* art. 12.

<sup>37</sup> *Id.* arts. 13-14.

<sup>38</sup> *Id.* art. 15. The memoranda focus almost entirely on U.S. law and U.S. remedies when addressing these issues, as if the treaty's express terms are irrelevant even for purposes of interpreting U.S. law. Thus, although one memorandum extensively addresses the possible use of involuntary detainee statements, the discussion is cast entirely in terms of U.S. case law. *See, e.g.*, Memo 26, *supra* note 17, at 335-336 (ignoring the categorical terms of Article 15 of the Torture Convention: "any statement which is established to have been made as a result of torture shall not be invoked as evidence in any proceeding," and how that provision has been interpreted by international authorities).

<sup>39</sup> *See, e.g.*, Memo 25, *supra* note 1, at 267-276 (addressing the prospects for civil liability under U.S. law, such as the ATCA and TVPA, as well as the Eighth, Fifth and Fourteenth Amendments, but denigrating the prospects for successful suit in U.S. courts); *see also* Complaint for Declaratory Relief and Damages, *Ali v. Rumsfeld*, No. 1:05-CV-1201 (N.D. Ill. 2005), available at [http://www.humanrightsfirst.org/us\\_law/etn/lawsuit/PDF/rums-complaint-022805.pdf](http://www.humanrightsfirst.org/us_law/etn/lawsuit/PDF/rums-complaint-022805.pdf) (alleging that Secretary of Defense Rumsfeld violated, among other things, the Torture Convention by expressly or tacitly authorizing unlawful conduct and failing to stop the abuse); *cf.* Paust, *supra* note 13, at 852-855.

<sup>40</sup> *See* Memo 14, *supra* note 9, at 199 (citing non-U.S. precedents *Ireland v. United Kingdom*, 25 Eur. Ct. H.R. (ser. A) (1978) and H CJ 5100/94 *Public Committee Against Torture in Israel v. Israel* [1999] *IsrSC* 46(2) 150). These cases are *astonishingly* read to "permit, under international law, an aggressive interpretation as to what amounts to torture, leaving that label to be applied only where extreme circumstances exist." Memo 14, *supra* note 9, at 199.

briefs by "can do" lawyers but certainly not objective examinations of the current treaty obligations of the United States.

### III. TORTURING CUSTOMARY INTERNATIONAL LAW, GENERAL PRINCIPLES OF LAW, AND JUS COGENS

But if the torture memoranda's treatment of relevant treaties is shoddy and incomplete, this does not begin to describe the cavalier, even reckless, treatment accorded to other sources of international law. The torture memoranda blithely conclude that customary international law simply cannot bind the executive or the U.S. military because it is "not federal law."<sup>41</sup> They also contend that the President's decision "concerning the detention of Al Qaeda and Taliban prisoners constitutes a "controlling" Executive act" that completely overrides any customary international law."<sup>42</sup> While both propositions are contestable and seemingly at odds with relevant Supreme Court precedents, including arguably *The Paquete Habana* itself, one would never know this from the memoranda themselves.<sup>43</sup> The memo-

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Even if these were plausible readings of these judgments, the conclusion reached is hardly representative of relevant "international decisions" on point. Not cited are later decisions by the European Court of Human Rights, such as *Aksoy v. Turkey*, 6 Eur. Ct. H.R. 2260 (1996); *T & V v. United Kingdom*, Judgment of Dec. 16, 1999, 30 E.H.R.R. 121, ¶ 71 (2000), decisions rendered under ad hoc war crimes tribunals such as *Prosecutor v. Kunarac*, Case No. IT-96-23-T & IT-96-23/1-T, Trial Judgment, ¶ 497 (Feb. 22, 2001), or a multitude of other international sources that condemn many specific kinds of interrogation techniques because they constitute either torture or inhumane treatment. *See also* U.N. Eco. & Soc. Council [ECOSOC], Comm. On Human Rights, Report of the Special Rapporteur on Torture and Other Cruel, Inhuman, or Degrading Treatment or Punishment, attached to U.N. Doc. A/59/324 (Sept. 1, 2004) (*prepared by Theo van Boven*) [hereinafter Report of the Special Rapporteur on Torture] (noting that the jurisprudence of both international and regional human rights mechanisms is unanimous in condemning interrogation methods such as holding detainees in painful and/or stressful positions, depriving them of sleep and light for prolonged periods, exposing them to extremes of heat, cold, noise and light, hooding, depriving them of clothing, or stripping detainees naked and threatening them with dogs).

<sup>41</sup> *See* Memo 25, *supra* note 1, at 243; Memo 4, *supra* note 15, at 71-76; Memo 6, *supra* note 15, at 112-16.

<sup>42</sup> Memo 6, *supra* note 15, at 112-116; *see also* Memo 25, *supra* note 1, at 243.

<sup>43</sup> *See The Paquete Habana*, 175 U.S. 677, 700 (1900). The famous passage in that judgment "where there is no treaty, and no controlling executive or legislative act or judicial decision," has been interpreted either as stating that customary international law necessarily gives way to a "controlling executive act," or as merely stating that customary international law exists as U.S. federal law *even when* no controlling executive or legislative act or judicial decision has previously recognized the custom in question. *See also* RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES §111, cmt. 3 (1987) ("[T]he modern view is that customary international law in the United States is federal law."); *cf.* Memo 6, *supra* note 15, at 112 (concluding that the view that customary international law is federal law is "seriously mistaken"); *cf. id.* at 116 (stating that the "legitimacy of incorporating customary international law as federal law has been subjected to . . . crippling doubts"); *but see* Memo 6, *supra* note 15 (mentioning the controversy over the status of customary interna-

randa elevate a one-sided, strongly contested revisionist conception of the status of international law in U.S. law, advocated by some U.S. scholars, into the status of hornbook law.<sup>44</sup> Moreover, even if the President's determinations that Geneva law does not apply to Al Qaeda and Taliban detainees were deemed "controlling" for purposes of U.S. courts, this says nothing about the rights of others originally detained far from Afghanistan but later transported there, to Guantánamo, or to secret detention locations around the globe. They too, after all, are detainees in the U.S.'s self-proclaimed "global war on terror." The memoranda say nothing about whether the President should be deemed to have silently overridden all relevant rights under international law for all non-U.S. nationals around the globe, including the *jus cogens* right of all human beings not to be tortured, much less about whether he could, constitutionally, much less under international law, trump such a fundamental norm.<sup>45</sup>

This dismissal of non-treaty sources allows the memoranda's authors to ignore considerable evidence of what constitutes torture as well as degrading treatment under customary law that is at odds with their restrictive interpretation of the "plain meaning" of the Torture Convention.<sup>46</sup> It means that these memoranda dismiss the Universal Declaration of Human Rights, relevant General Assembly resolutions, and influential treaties that

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tional law and citing in a footnote the titles of some of the law review articles that respond to articles by Curtis Bradley and Jack Goldsmith (which affirm that customary international law ought not be seen as federal law) the substantive arguments in favor of the traditional position that customary law is federal law are ignored. The memorandum is written as a brief in favor of the controversial Bradley-Goldsmith position and not as a balanced presentation of the opposing arguments that would be presented to a court should the question be raised.) Cf. *Sosa v. Alvarez-Machain*, 175 U.S. 677, 692 (2004) (affirming that customary international law has some standing as federal law).

<sup>44</sup> Indeed, the memorandum that addresses customary international law in the greatest detail cites its author's own scholarship in support of its revisionist views of that law. See Memo 4, *supra* note 15, at 72 n.116 (citing in support Professor John Yoo's own scholarship).

<sup>45</sup> Cf. RESTATEMENT (THIRD) OF THE FOREIGN RELATIONS LAW OF THE UNITED STATES § 115 n. 3 (noting that there is "some authority" for the proposition that the President may be able to violate customary international law but also noting the possibility that a U.S. court would dismiss the issue as a "political question"). There is a serious question whether, consistent with the canon of interpretation requiring U.S. law to be read, if possible, not to violate international law, an ambiguous Presidential order would be read by a court as having such effects, particularly with respect to a *jus cogens* norm.

<sup>46</sup> See, e.g., Resolution of Torture and other Cruel, Inhuman or Degrading Treatment or Punishment, G.A. Res. 59/182, ¶¶ 1-2, U.N. Doc. A/RES/59/182 (Mar. 8, 2004) (condemning "all forms of torture and other cruel, inhuman or degrading treatment . . . including through intimidation, which are and shall remain prohibited at any time and in any place whatsoever and can thus never be justified" and condemning "any action or attempt by States or public officials to legalize or authorize . . . [such conduct] under any circumstances, including on grounds of national security").

the United States has not ratified such as the American Convention on Human Rights or the First Additional Protocol to the Geneva Conventions, as simply "not binding on the United States" and only "instruments [that] may inform the views of other nations."<sup>47</sup>

Because the memoranda's writers relegate all non-treaty based sources of international obligation to the non-legal realm, they do not treat seriously the prospect that, whatever is the case with respect to the jurisdictional scope of some human rights treaties, the customary prohibitions on torture and inhumane treatment, along with norms of *jus cogens*, apply to all human beings irrespective of where they are located. Their trashing of customary law also renders it unnecessary for the torture authors to consider whether the U.S. reservations to the Torture Convention on which they rely, even if correctly interpreted, can trump a prohibition that everyone, including our courts, agrees is non-derogable as a matter of both customary and treaty law.<sup>48</sup>

Although the discussion of customary international law in these memoranda is limited to its status as federal law and its possible use as a cause of action in U.S. federal courts, even this discussion is tortuously constricted. Other than a brief footnote mentioning but denigrating the significance of the Charming Betsy rule,<sup>49</sup> the most extensive discussion of customary international law in these memoranda fails to consider the role of custom in the construction of treaty obligations of the United States or U.S. federal law, whether the criminal statute on torture or the Torture Victim Protection Act ("TVPA"), much less the special status of *jus cogens*.

The torture memoranda also do not engage in any significant discussion of the consequences of U.S. breaches of customary law or *jus cogens*, other than possible actions in U.S. courts. The memoranda scarcely mention, much less highlight, the basic fact that neither U.S. federal or constitutional law, nor executive determinations, can excuse a violation of in-

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<sup>47</sup> Memo 26, *supra* note 17, at 338; see also Memo 6, *supra* note 15, at 102 (noting that the question of whether the President can suspend Geneva rights under international law "has no bearing on domestic constitutional issues, or on the application of the [War Crimes Act]" but is worth considering "as a means of justifying the actions of the United States in the world of international politics"). These memoranda fail to recognize that many concepts in the First Protocol merely codify previously accepted rules of customary international law that are binding on the United States irrespective of its failure to ratify that instrument.

<sup>48</sup> See, e.g., ICCPR, *supra* note 14, art. 4 (ban on torture is not derogable).

<sup>49</sup> Memo 6, *supra* note 15, at 115, n.129 (contending that the Charming Betsy articulates a rule of judicial restraint that does not apply international law of its own force but compels the political branches to clearly state their intention to violate the law). Cf. Ralph G. Steinhardt, *The Role of International Law As a Canon of Domestic Statutory Construction*, 43 VAND. L. REV. 1103 (1990) (canvassing U.S. precedents applying the Charming Betsy rule in a variety of contexts to further a number of goals).

ternational law.<sup>50</sup> They do not point out that breaches of non-treaty sources of international law have potential consequences for the United States in terms of its own ability to rely on these norms (as for its own citizens detained elsewhere), the evolving interpretation of these customary laws for all states should U.S. interpretations prove persuasive to others, and the nation's ability to rely on these sources for other purposes. The underlying rules of state responsibility are not mentioned. There is therefore no discussion that a breach of these non-treaty sources of international law triggers the international liability of the U.S. no less than any treaty breach, no consideration of potential adverse consequences through denials of reciprocal treatment outside the context of the Geneva Conventions, countermeasures by other states, or adjudication in the International Court of Justice ("ICJ") or other nations' courts. And although several of the memoranda purport to address the "historical, policy and operational considerations" and not merely the legal concerns with respect to detainee interrogations in the global war on terror,<sup>51</sup> even these do not address the indelible links between the *erga omnes* obligations imposed on states precluding torture and inhumane treatment and the historic U.S. commitment to promoting universal, fundamental, and inalienable rights to human dignity. Nothing is said about *why* states, including the United States, believed it to be important to undertake such strenuous efforts over so many years to make the prohibition on torture non-derogable, such that it cannot be overridden, expressly or by implication by, for example, an agreement to transfer suspects between the United States and other countries. Indeed, the most detailed memorandum on the subject of applicable legal standards for interrogation acknowledges, at the outset, that "other nations and international bodies may take a more restrictive view," but relegates such views to second-order considerations of "policy."<sup>52</sup> Thus, while the torture memoranda spend considerable time discussing the ostensible rationales of relevant U.S. laws, such as the War Crimes Act,<sup>53</sup> the rationales of non-treaty sources of international obligation are almost entirely ignored. Readers are left with the impression that these non-treaty sources are illegitimate rules suggested by others that have somehow emerged contrary to the will or national interests of the United States.

#### IV. TORTURING INTERNATIONAL CRIMINAL LAW

Since the torture memoranda dismiss the relevance of the Geneva Conventions and customary international law, they address only the precise

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<sup>50</sup> See, e.g., Vienna Convention, *supra* note 26, art. 27.

<sup>51</sup> See Memo 25, *supra* note 1, at 241; see also Memo 26, *supra* note 17, at 286.

<sup>52</sup> Memo 25, *supra* note 1, at 241.

<sup>53</sup> 18 U.S.C. § 2441 (2000).



federal crimes codified in the U.S. War Crimes Act. The memoranda mention only in passing that violations of Common Article 3 of the Geneva Conventions and inhumane treatment of certain detainees are war crimes, under both customary and treaty law. Violations may subject perpetrators to criminal liability before the International Criminal Court ("ICC") or in a national court outside the U.S. that respects some forms of extraterritorial jurisdiction or universal jurisdiction for such crimes.<sup>54</sup> The memoranda spend a great deal of time addressing alleged defenses to war crimes charges under both U.S. and international law, but devote almost no attention to the substantive standards that govern criminal liability under international law, even though these standards might be applied by U.S. courts and are surely likely to be invoked should U.S. personnel, contractors or agents ever be charged outside of the United States. Relevant international standards for determining what constitutes "aiding or abetting," or "conspiracy" to commit torture are ignored, even while the memoranda writers reassure the executive that Article 98 bilateral agreements excluding U.S. nationals from the jurisdiction of the ICC are being negotiated "with as many countries as possible."<sup>55</sup> In light of numerous and serious allegations that U.S. officials may be "outsourcing" torture to private contractors or other governments and may even be sitting in on such sessions abroad, one would expect that 50-100 page memoranda written to advise the Executive Branch would find some room for serious consideration of what constitutes the *actus reus* and *mens rea* that might trigger international criminal liability, including as accomplices or aiders or abettors, especially when others act at the instigation of or with the consent or acquiescence of U.S. government or military officials.<sup>56</sup>

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<sup>54</sup> See, e.g., Memo 26, *supra* note 17, at 339.

<sup>55</sup> *Id.* This memorandum does not mention that the legality of these agreements is contested.

<sup>56</sup> Cf. Report of the Special Rapporteur on Torture, *supra* note 40, ¶ 15 (noting that all such acts engage the state's responsibility) and ¶ 19 (discussing responsibility for the acts of private contractors). See, e.g., Prosecutor v. Furundzija, Case No. IT-95-17/1-T, Judgment, ¶ 207 (Dec. 10, 1998) (finding that mere presence that encourages perpetrators of torture may constitute "complicity in a crime against humanity"). For a more thorough discussion of U.S. and international law regarding attempts, conspiracy, and aiding and abetting as these pertain to "extraordinary renditions," see Torture by Proxy, *supra* note 9, at 44-46, 48-49, 71-73. For a general discussion of relevant international precedents on what constitutes complicity under international law, see, e.g., Andrew Clapham, *On Complicity*, in LE DROIT PÉNAL À L'ÉPREUVE DE L'INTERNATIONALISATION 241 (Marc Henzelin & Robert Roth eds., 2002). Cf. Text of the Draft Articles on Responsibility of States for Internationally Wrongful Acts, in Report of the International Law Commission on the Work of its Fifty-Third Session, U.N. GAOR, 56th Sess., Supp. No. 10, at 43, U.N. Doc. A/56/10 (Oct. 1, 2001) [hereinafter *Articles of Responsibility of States for Internationally Wrongful Acts*] (defining aid or assistance in the commission of an internationally wrongful act).

Perhaps less surprisingly, the memoranda also do not address the potential criminal liability of government lawyers such as the memoranda writers themselves. Readers of these memoranda are not informed of certain disturbing historical parallels between some of the arguments being presented and those made by high government officials and lawyers in Nazi Germany. At the end of World War II, the U.S. was instrumental in convicting Nazi leaders who had argued that the traditional customary norms governing the rules of war were "obsolete" with respect to the Soviets since they were a new kind of unconventional and "barbaric" "terrorist" adversary requiring a new (as yet undefined) legal paradigm.<sup>57</sup>

Insofar as these memoranda imply that those facing the possibility of criminal convictions can avoid such charges on the basis of self-defense, necessity, or because their Commander-in-Chief ordered them to defend the nation against terrorism, these contentions torture beyond recognition relevant defenses under international criminal law. Whatever may be the case under *In re Neagle*,<sup>58</sup> a 1890 U.S. Supreme Court case on which the memoranda writers rely, the premise that a government official charged with a war crime can claim that he was acting pursuant to "self-defense" because he was protecting not himself or another individual but the "United States Government,"<sup>59</sup> is a perversion of both pre- and post-Nuremberg law. The

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<sup>57</sup> Scott Horton, *Through a Mirror, Darkly: Applying the Geneva Conventions to "A New Kind of Warfare,"* in *THE TORTURE DEBATE IN AMERICA* 136, 145-146 (Karen Greenberg ed., 2005) (summarizing the rationales offered by Nazi officials for evading, in connection with the Eastern front, then-existing international humanitarian law as the following: (1) because the Soviets were "barbaric" enemies engaged in non-conventional "terrorist" practices; (2) because such persons were not entitled to either the substantive or procedural protections of international humanitarian law; (3) because the relevant laws of war were "obsolete" and ill-suited to this kind of ideologically driven warfare; (4) because Germany's enemies would not reciprocally apply the law; (5) because construction of international law should be driven in the first instance by a "clear understanding of the national interest as determined by the executive;" and (6) because the rules of international law were subordinate to the military interests of Germany as determined by the German Fuhrer. Cf. Memo 7, *supra* note 12, at 119 (arguing that terrorism requires a "new kind of war" and that this "new paradigm renders obsolete Geneva's strict limitations on questioning of enemy prisoners"). While some scholars have suggested that the post 9/11 "war" on terror constitutes a relatively new phenomenon requiring "adjustments" in both domestic and international rules, those sensitive to attendant risks are also quick to affirm that some irreducible principles should not in any case be broached, such as the rule "that those who execute the law must *never* be the sole and final arbiters of that law." Thomas M. Franck, *Criminals, Combatants, or What? An Examination of the Role of Law in Responding to the Threat of Terror*, 98 AM. J. INT'L L. 686, 688 (2004) (emphasis in original).

<sup>58</sup> *In re Neagle*, 135 U.S. 1 (1890).

<sup>59</sup> Memo 25, *supra* note 1, at 263 (asserting that "any conduct that arguably violated a criminal prohibition . . . [is subject to] more than just individual self-defense or defense of another" and is also subject to a defense that the individual was "fulfilling the Executive Branch's authority to protect the federal government, and the nation, from attack").

invocation of individual or collective self-defense is not a defense to grave breaches of the Geneva Conventions, which is, after all, law that presumes the existence of two warring parties, each convinced that it is defending itself against the other.<sup>60</sup> It is also not a cognizable defense to the crime of torture as required by the Torture Convention or as foreseen by other human rights instruments, such as the ICCPR.<sup>61</sup> Article 2 of the Torture Convention, for example, does not say that government officials or military personnel can torture whenever there is a public emergency, crisis or threat to the nation.<sup>62</sup> It states the opposite.<sup>63</sup>

While an individual facing *duress* might conceivably have a defense to a war crime or may use such personal circumstances to mitigate punishment,<sup>64</sup> neither the ad hoc war crimes tribunals nor the ICC includes a defense of self-defense based on a threat to governmental interests; indeed not including such a defense is one of the principal rationales for making the ban on torture non-derogable. The idea that self-defense is a defense to a war crimes charge confuses the rules governing *jus in bello* with those governing *jus ad bellum*. Self-defense, in international law, operates only as a defense for *states* that engage in the use of force.<sup>65</sup>

The memoranda create, from whole cloth, a defense of "necessity" from the "choice of evils" provision in the U.S. Model Penal Code.<sup>66</sup> They do not indicate that such a defense is not possible under the categorical terms of the Torture Convention nor under the statutes of the ad hoc war crimes tribunals or the ICC, all of which the United States was instrumental

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<sup>60</sup> See, e.g., Torture by Proxy, *supra* note 9, at 79-82 (discussing the non-derogability of torture under the Torture Convention and Geneva law).

<sup>61</sup> *Id.* at 78-79.

<sup>62</sup> See Torture Convention, *supra* note 14, art. 2.

<sup>63</sup> See *id.*

<sup>64</sup> See, e.g., Prosecutor v. Erdemovic, Case No. IT-96-22, Sentencing Appeal (Oct. 7, 1997) (explaining that duress is not a complete defense but can mitigate punishment). *But see* Prosecutor v. Erdemovic, Case No. IT-96-22, Separate and Dissenting Opinion of Judge Cassese (Oct. 7, 1997) (asserting that duress can constitute a defense). See also Rome Statute of the International Criminal Court art. 31, July 17, 1998, 2187 U.N.T.S. 90 [hereinafter Rome Statute] (stating that duress is included as grounds for excluding criminal responsibility). Note that the wording of Article 31 makes clear that the concept of duress is limited to circumstances resulting from a threat of imminent death or serious bodily harm against a person, and not against a nation or governmental interests. *Id.*

<sup>65</sup> As the memoranda acknowledge, this is a defense at the *interstate* level under Article 51 of the UN Charter. See Memo 25, *supra* note 1, at 264, n.24; see also Torture by Proxy, *supra* note 9, at 78-79 (stating that such a defense might be relevant in the context of a war crimes trial of an individual where the charge was, as at Nuremberg, waging a crime against peace or a crime of aggression). As is well known, the international community is still struggling with a modern definition of the crime of aggression and that crime is not yet included as a possible charge before any international war crimes tribunal.

<sup>66</sup> See, e.g., Memo 25, *supra* note 1, at 260-61.

in drafting. International law does not contemplate that there is a “greater” evil that torture is intended to preclude. Indeed, an analogous defense, based on the premise that the acts committed by government officials were allegedly a “lesser evil,” was repeatedly rejected at Nuremberg and subsequent occupation trials.<sup>67</sup>

The memoranda also fail to consider the single instance in which necessity as a defense exists in international law, namely as a possible defense to *state* responsibility. Even for this purpose, which impacts state discretion to a much lesser extent than criminal charges brought against its highest officials, the burdens imposed on states claiming such an affirmative defense are steep. As recently codified by the International Law Commission (“ILC”), a state may invoke necessity as a ground precluding wrongfulness if, among other things, the act taken “is the only [means] for the State to safeguard an essential interest against a grave and imminent peril.”<sup>68</sup> Even assuming that necessity were somehow extrapolated to provide a defense to international crimes, it is difficult to see how the United States, or any state, would be able to meet a burden that requires it to show that torturing a suspect was the “only” way that a state had at its disposal to deal with an on-going or imminent threat.<sup>69</sup> In addition, as the ILC’s rules

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<sup>67</sup> See, e.g., Altstoetter, *supra* note 20, at 1086 (rejecting Schlegelberger’s defense that his actions prevented graver violations of the fair administration of justice).

<sup>68</sup> *Articles on Responsibility of States for Internationally Wrongful Acts*, *supra* note 56, art. 25 (addressing the liability of governments to each other under customary international law for violations of international law). These Articles do not address the criminal liability of individuals under international criminal law.

<sup>69</sup> See Florian Jessberger, *Bad Torture- Good Torture?*, 3 J. INT’L CRIM. JUST. 1059 (2005) (discussing a German court decision involving the threat of torture against a kidnapper in an effort to save the kidnap victim where the court found the two police officers involved “guilty, but not to be punished”); Oren Gross, *Are Torture Warrants Warranted? Pragmatic Absolutism and Official Disobedience*, 88 MINN. L. REV. 1481, 1502-1503 (2004) (enumerating some of the evidentiary difficulties presented in the familiar “ticking bomb scenario”). As the Jessberger and Gross articles indicate, consideration of “necessity” in the mitigation of a sentence ordered against a convicted torturer envisions a case-specific and post-hoc determination that the particular action taken by the official actor was in fact “necessary.” It requires that the official asserting necessity have specific knowledge that the detainee before him or her has direct knowledge of a specific imminent attack or threat to innocent life. The torture memoranda do not limit themselves to such “ticking time” scenarios; on the contrary, some of the memoranda address a broad range of situations, including questioning for military operations and intelligence information, “interrogations for criminal law enforcement,” “interrogations by investigative services of one of the U.S. Armed Forces investigating war crimes,” and “interrogations with mixed or dual purposes.” See, e.g., Memorandum from Jay S. Bybee, Assistant Attorney Gen., U.S. Dep’t of Justice, to William J. Haynes, II, Gen. Counsel, Dep’t of Def., Potential Legal Constraints Applicable to Interrogations of Persons Captured by U.S. Armed Forces in Afghanistan (Feb. 26, 2002), *reprinted in* TORTURE PAPERS, *supra* note 1, at 153, 161, 163, 165 [hereinafter Memo 13]. The memoranda also do not clarify whether the proposed defenses of necessity, self-defense, or Presidential approval would apply in all of these contexts or only to some of them. If news reports are accurate,

of state responsibility make clear, even a successful plea of necessity does not automatically excuse the state from paying compensation "for any material loss caused by the act in question."<sup>70</sup> Providing for compensation mechanisms for torture victims is, as noted, a requirement of the Torture Convention.<sup>71</sup>

The torture memoranda undermine settled post-Nuremberg law concerning superior orders in two ways. The memoranda acknowledge, as they must, that following orders is not a defense but may be considered only in the mitigation of punishment.<sup>72</sup> Nonetheless, the memoranda writers contend that U.S. executive officials ought not to be prosecuted for interrogations that merely carry out the President's Commander-in-Chief powers and that U.S. laws, including criminal laws, ought to be interpreted to avoid constitutional problems such as interference with the President's conduct of war.<sup>73</sup> When this is combined with the writers' expansive views of the President's powers in this respect, this sends a clear message that at least when the President issues a written directive authorizing certain methods of interrogation, his determination provides complete protection from criminal prosecution.<sup>74</sup>

Following orders is also turned from a consideration that might mitigate punishment on a case by case basis into an absolute defense from criminal liability in a second, more subtle way. Having spent considerable time re-defining torture so that many interrogation techniques no longer qualify as patently unlawful, the memoranda's most extensive treatment of the superior orders defense begins by noting that "[u]nder both international law and U.S. law, an order to commit an obviously criminal act, such as the wanton killing of a noncombatant or the torture of a prisoner, is an *unlawful* order that will not relieve a subordinate of his responsibility to comply with the law of armed conflict."<sup>75</sup> That memorandum goes on to stress that such orders must outrage fundamental concepts of justice for these to be legiti-

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U.S. interrogators have adopted policies involving physical coercion against large numbers of detainees going far beyond those who might credibly be said to have had knowledge of specific imminent attacks. But as one critic has noted, if it is to be justified on the basis of necessity, torture must be the exception, not the norm. Parry, *supra* note 8, at 259.

<sup>70</sup> *Responsibility of States for Internationally Wrongful Acts*, art. 27(b), *supra* note 68.

<sup>71</sup> Torture Convention, *supra* note 14, art. 14(1).

<sup>72</sup> See *In re Yamashita*, 327 U.S. 1 (1946).

<sup>73</sup> See, e.g., Memo 14, *supra* note 9, at 202-204.

<sup>74</sup> As Harold Koh indicates, these contentions assert unwarranted claims for complete immunity for executive officials and for a following orders defense for those in the chain of command. Koh, *supra* note 13, at 651. Cf. Torture by Proxy, *supra* note 9, at 28-29 (suggesting that the "take care" clause would bar the President from concluding international agreements that would permit or aid torture).

<sup>75</sup> Memo 25, *supra* note 1, at 265 (emphasis in original).

mately disobeyed and emphasizes that an individual that obeys an order that he does not know is unlawful has a complete defense.<sup>76</sup> But since the memoranda themselves have strongly implied that many interrogation techniques short of those causing the most intensive physical pain do not offend fundamental precepts of justice, the stage is set for the memoranda's presumption that U.S. interrogation orders will never be patently unlawful. The sections of these memoranda addressing superior orders conclude, therefore, not with the usual negative injunction (superior orders are generally not a defense) but with the opposite, more positive spin: "the defense of superior orders will generally be available for U.S. Armed Forces personnel engaged in exceptional interrogations except where the conduct goes so far as to be patently unlawful."<sup>77</sup>

The defenses to criminal accountability envisioned in these memoranda would, in short, render the category of "war crimes" into essentially an empty set.

The torture memoranda mangle more than just international law. Others have ably demonstrated the number of ways that these documents offer only a cramped view of relevant guarantees in the U.S. Constitution, such that the prohibition on cruel and unusual punishment only applies to those convicted of crimes and does not apply to pre-conviction custodial interrogations;<sup>78</sup> constitutional guarantees of due process, which are categorically stated not to apply either to nonresident enemy aliens outside the territory of the United States or unlawful combatants such as those held in Guantánamo,<sup>79</sup> and foundational principles of checks and balances and separation of powers, which are bypassed through an expansive, lawless re-

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<sup>76</sup> *Id.*

<sup>77</sup> *Id.* at 266.

<sup>78</sup> See, e.g., Memo 25, *supra* note 1, at 268-271. Cf. Keller, *supra* note 23, at 557-568 (2005) (noting dicta in Supreme Court cases that imply that the Eighth Amendment extends to pre-conviction punishment such as torturous interrogation, other cases suggesting that the Fifth Amendment's privilege against self-incrimination might cover interrogations where no criminal charges are brought, and cases suggesting that coercive interrogation in and of itself may violate the Fourteenth Amendment's right to substantive due process). To the extent the torture memoranda writers take a constricted view of the Fifth, Eighth or Fourteenth Amendments, this affects their interpretation of the scope of protection against cruel, inhuman and degrading treatment in the Torture Convention since, as they repeatedly stress, the U.S. reservation equates the treaty standard to those in the U.S. Constitution. See, e.g., Memo 25, *supra* note 1, at 269.

<sup>79</sup> See, e.g., Memo 25, *supra* note 1, at 268. Cf. *Rasul v. Bush*, 124 U.S. 2686, 2698 n.15 (2004) (suggesting that foreign nationals in U.S. custody at Guantánamo Naval Base possess constitutional rights); See generally Gerald L. Neuman, *Extraterritorial Rights and Constitutional Methodology After Rasul v. Bush*, 153 U. PA. L. REV. 2073 (2005) (distinguishing three distinct approaches to the extraterritorial scope of U.S. constitutional rights derived from prior Supreme Court judgments).

interpretation of the scope of Presidential powers.<sup>80</sup> Others, such as Jeremy Waldron, have argued, persuasively, that the torture memoranda undermine the rule of law itself<sup>81</sup>—ironically, the principal policy objective now given for the U.S. presence in Iraq.

It would be gratifying to say that the Bush Administration's more recent renunciations of the Yoo-Bybee line of memoranda show that the law cannot be successfully tortured, but this would be untrue. The Administration's renunciation of the more extreme positions taken in prior memoranda appears to stem more from the power of the camera than the vindicating power of legal truth. It was only after Abu Ghraib photographs seized the world's attention—and made it impossible for the Administration to claim no such acts were being committed by its personnel—that it retreated from some of the more extreme legal arguments made in its own torture memoranda. Contrast the Administration's reaction to Abu Ghraib to its continuing defense of the "legal black hole" that is Guantánamo, which has not been the subject of incriminating photographs to indicate the tangible harms of indefinite detention without trial, or the Administration's continued denials, despite considerable reports to the contrary, of comparable inhumane treatment of detainees elsewhere or of a regular policy of "extraordinary renditions" to countries that apparently are only too willing to torture on our behalf.<sup>82</sup> The Administration's continuing ability to misapply the law of the U.N. Charter (by ignoring its human rights provisions as well as its bar on the use of force with respect to Iraq) or to torture the Geneva Conventions (by ruling it automatically inapplicable to the regular army of Afghanistan as well as enemy combatants by Presidential fiat without benefit of a timely

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<sup>80</sup> See, e.g., Memo 14, *supra* note 9, at 204-207 (contending that any efforts by Congress to regulate the interrogation of battlefield combatants would be unconstitutional). See also Memorandum from John C. Yoo, Deputy Assistant Attorney Gen., U.S. Dep't of Justice, to Timothy Flanigan, Deputy Counsel to the President, The President's Constitutional Authority to Conduct Military Operations Against Terrorists and Nations Supporting Them (Sept. 25, 2001), reprinted in TORTURE PAPERS, *supra* note 1, at 3 (arguing for an expansive view of "unreviewable" Presidential power to take any and all military action, including preventive action, against all terrorist groups whether or not linked to Sept. 11th). Ironically, another one of the torture memoranda derives this extraordinary view of Presidential power to take defensive action precisely from the President's "power under Article II to take care that the laws are faithfully executed." Memo 25, *supra* note 1, at 263. Cf. Koh, *supra* note 13, at 648-56 (offering a very different view of the scope of Presidential powers); Derek Jinks & David Sloss, *Is the President Bound by the Geneva Conventions?*, 90 CORNELL L. REV. 97, 131 (2004); *Youngstown Steel & Tube Co. v. Sawyer*, 343 U.S. 579, 635-38 (1952); *Rasul*, 542 U.S. at 486-7. See generally Association of the Bar of the City of New York, *The Indefinite Detention of "Enemy Combatants": Balancing Due Process and National Security in the Context of the War on Terror*, Feb. 6, 2004.

<sup>81</sup> See Waldron, *supra* note 11.

<sup>82</sup> See generally Torture by Proxy, *supra* note 9 (providing analysis of the legality of extraordinary rendition under U.S. and international law).

hearing) suggests that it is possible for “can-do” lawyers to interpret legal obligations away and get away with it, at least for a time. After all, even the authors of the most notorious torture memoranda have not been punished, and some have been rewarded, for torturing the law.<sup>83</sup> Indeed, the Administration’s continuing success in torturing numerous areas of both international and national law suggests that its UN ambassador, John Bolton, did not go far enough when he argued that international law is not really law.<sup>84</sup> It would appear that neither U.S. statutory nor federal law is really binding law, at least not for a President (or an attorney general) who asserts that any Congressional attempts to restrain the President’s “plenary” power over military operations, including the treatment of prisoners, would be unconstitutional.<sup>85</sup>

This is further suggested by the hedged nature of the Administration’s renunciations of some of the prior torture memoranda. The Memorandum to Deputy Attorney General James B. Comey of Dec. 30, 2004, released days before Senate hearings to consider the nomination of Alberto Gonzales for Attorney General, rectifies only some of the foregoing tortured interpretations of law. The new Comey memorandum disavows the use of torture and disagrees with the contention that torture only encompasses exceptionally severe injury such as organ failure or death.<sup>86</sup> It also distinguishes “specific intent” from motive, indicating that a motive to protect national security is not relevant to the question of whether a defendant acted with requisite specific intent to commit a crime.<sup>87</sup> But the new memorandum does not disavow prior legal interpretations of the apparently unlimited powers of the Commander-in-Chief, stating only that it is “unnecessary” to consider such claims in light of the new assurances that the U.S. government does not engage in torture.<sup>88</sup> Nor does the memorandum revisit the

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<sup>83</sup> Jay Bybee was appointed to the U.S. Court of Appeals for the 9th Circuit. United States Court of Appeals for the Ninth Circuit, <http://www.ca9.uscourts.gov> (last visited February 28, 2006).

<sup>84</sup> John R. Bolton, *Is There Really “Law” in International Affairs?*, 10 *TRANSNAT’L L. & CONTEMP. PROBS.* 1, 48 (2000). Of course, Bolton’s position with respect to treaties ignores the Supremacy Clause of the U.S. Constitution which accords treaties, along with laws of the United States, the status of ‘the supreme law of the land.’ U.S. CONST. art. VI.

<sup>85</sup> See, e.g., Memo 4, *supra* note 15; Memo 25, *supra* note 1. Cf. Bacchus, *supra* note 1, at 327 (comparing such sentiments to Jefferson’s conception that ours was a government of laws, not of men). This view of untrammelled executive power, at odds with the Supreme Court’s recent judgment in *Hamdi v. Rumsfeld*, 542 U.S. 507, 589 (2004), for example, would imply that we are a nation under the rule of one man in particular, namely the Commander-in-Chief.

<sup>86</sup> Comey Memo, *supra* note 23, at 5-15.

<sup>87</sup> *Id.* at 17.

<sup>88</sup> *Id.* at 2. As Diane Amann has noted, the Comey Memo continues to deny that international treaties or customary international law may limit the executive’s ability to engage in



scope or meaning of the international and U.S. constitutional ban on cruel and unusual punishment; indeed, the current U.S. Attorney General continues to suggest that some forms of cruel, inhumane and degrading treatment remain permissible during interrogation, at least by the Central Intelligence Agency ("CIA") and other U.S. personnel when they act outside the territory of the United States.<sup>89</sup>

#### V. THE GOLDSMITH MEMORANDUM

The Administration's belated assurances in the Comey memorandum that it does not *itself* engage in torture also fails to mention the last memorandum included in *The Torture Papers*, then Assistant Attorney General's Jack L. Goldsmith's March 19, 2004 memorandum to top lawyers at the U.S. Department of State, the Department of Defense, and the CIA as well as the Legal Adviser for National Security.<sup>90</sup> This memorandum opens

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torture or inhumane treatment. Amann, *supra* note 13, at 2123. At his confirmation hearings for Attorney General, Gonzales pointedly did not affirm that the President has a duty himself to enforce and abide by the law, even though, of course, the text of the U.S. Constitution would appear to indicate precisely that. See Eric Lichtblau, *Gonzales Speaks Against Torture During Hearing*, N.Y. TIMES, Jan. 7, 2005, at A1 (quoting Gonzales' response to whether he agreed that the President could ignore the ban on torture: "I guess I would have to say that hypothetically that authority may exist"). As of this writing, the Administration continues to resist proposed legislation that would enumerate permissible interrogation methods, ban the use of torture or cruel inhumane treatment by U.S. agents when acting abroad, or that would criminalize instances in which U.S. officials abroad transfer individuals to countries that pose a serious risk of torturing the transferees.

<sup>89</sup> See, e.g., Koh, *supra* note 13, at 652 n.46 (citing Gonzales's January 2005 responses to the Senate Judiciary Committee). See generally Seth F. Kreimer, *Too Close to the Rack and the Screw: Constitutional Constraints on Torture in the War on Terror*, 6 U. PA. J. CONST. L. 278 (2003).

<sup>90</sup> The Goldsmith memorandum became generally known in late 2004 and it later became publicly available via the web. See John Crook, *Reported Removal of Prisoners from Iraq*, 99 AM. J. INT'L L. 265 (2005). Notably, the White House succeeded, in the wake of the Comey memorandum, in deleting from intelligence reform legislation a measure that "would have explicitly extended to intelligence officers a prohibition against torture or inhumane treatment, and would have required the CIA as well as the Pentagon to report to Congress about the methods they were using." Keller, *supra* note 23, at 556 (quoting New York Times report of Jan. 13, 2005). The difficult question of whether the law of armed occupation has ceased to apply to Iraq after the Interim Government assumed authority on June 30, 2004, in accordance with S.C. Res. 1546, U.N. Doc. S/RES/1546 (June 8, 2004) (suggesting that the end of occupation occurred on that date), lies outside the scope of this essay. It is sufficient to note that many experts in international humanitarian law, and apparently the United States Government itself, have argued that while the formal occupation may have ended on June 30, 2004, the U.S.-led multilateral force that, by agreement between the Interim Government and the United States remains responsible for security, remains subject to the laws of armed conflict as modified by relevant Security Council resolutions, "including the Geneva Conventions." See *id.* (Annex) (incorporating a June 5, 2004 letter from then Secretary of State Powell). See also ADAM ROBERTS, *THE END OF OCCUPATION IN IRAQ* (2004),

the door for the United States to remove, permanently, “illegal aliens” from occupied territories such as Iraq and to transfer, for an unspecified temporary period, all others, including citizens of occupied territory, to other countries to “facilitate interrogation.”<sup>91</sup> Although identified as a mere “draft” like several others in *The Torture Papers*, this memorandum, unlike some others, has not been renounced by the U.S. government and its legal conclusions may reflect existing Administration policy.<sup>92</sup>

The Goldsmith memorandum has been generally spared the opprobrium of the torture memoranda drafted by Bybee or Yoo.<sup>93</sup> It is not hard to see why. Goldsmith avoids contentious claims about the meaning of the U.S. Bill of Rights, the scope of Presidential powers, or the availability of general excuses like necessity or self-defense. His memorandum does not address torture or other forms of coercive interrogation. It is narrowly focused on the meaning of two words, “deportation” and “transfer,” in a single sentence in Article 49 of the Fourth Geneva Convention, which prohibits “individual or mass forcible transfers, as well as deportation of protected persons from occupied territory to the territory of the Occupying Power or to that of any other country, occupied or not, . . . regardless of their motive.”<sup>94</sup> Although Goldsmith concludes, contrary to this seemingly unequivocal ban, that this does not prevent the permanent deportation of illegal aliens from occupied territory nor the temporary removal of others, in-

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<http://www.ihlresearch.org/iraq/pdfs/briefing3461.pdf> (concluding that the multilateral force cannot, even after June 30th, deport Iraqi civilians “under any circumstances” consistent with Article 49 of Geneva IV). Note that to the extent occupation law no longer applies to Iraq, the multilateral force would presumably still be subject to Iraq’s human rights obligations under treaty as well as customary law.

<sup>91</sup> Memo 28, *supra* note 9, at 366.

<sup>92</sup> Cf. Comey Memo, *supra* note 23 (renouncing portions of the prior Bybee/Yoo memoranda). It is not uncommon for government attorneys to routinely stamp “draft” on their opinions, even when these are effectively final. Indeed, there is some evidence that the Goldsmith memorandum has been given effect. Thus, although then-attorney general nominee (to whom the Goldsmith memorandum is addressed) noted that this memorandum was never finalized or signed, by late October 2004, there were press reports that the CIA had transferred as many as a dozen non-Iraqi prisoners out of Iraq for interrogation elsewhere. Crook, *supra* note 90. Whether or not the Goldsmith memorandum was solicited precisely to justify such transfers, one would have thought, especially given continuing allegations of the secret transfer of prisoners and detention camps directed at the U.S. or its agents, that once the Goldsmith memorandum became public the U.S. government would have sought to distance itself from its conclusions if these did not reflect its existing policies and it was not transferring protected persons out of Iraq.

<sup>93</sup> But see Paust, *supra* note 13, at 850-851. Indeed, Goldsmith has been lauded in the press for reportedly resisting some of the extreme conclusions reached in the prior Bybee/Yoo torture memoranda and for encouraging the Administration to renounce these in the Comey Memo. See, e.g., Daniel Klaidman et al., *Palace Revolt*, NEWSWEEK, Feb. 6, 2006, at 34.

<sup>94</sup> Geneva IV, *supra* note 14, art. 49; Memo 28, *supra* note 9.

cluding Iraqi nationals, to "facilitate" interrogation, the basis for these conclusions lies, according to the memorandum, in pre-existing customary international law as well as the standard rules of treaty interpretation. The memorandum's erudite fourteen single space pages seem plausible applications of plain meaning, object and purpose, and context. Unlike Bybee and Yoo, Goldsmith seems respectful, not contemptuous, of both treaty and customary legal sources of obligation.

But appearances can be deceiving. Upon closer inspection, this memorandum also tortures the law. Indeed, the memorandum is all the more dangerous because the conclusions reached have such surface appeal and because they threaten to become, if they have not achieved this status already, a significant inducement for the outsourcing of torture.

The more plausible of Goldsmith's conclusions is that Article 49 does not preclude the normal application of the occupied state's immigration laws and therefore the deportation of illegal aliens who, by definition, have no legal right to remain on occupied territory. But, contrary to Goldsmith's strenuous efforts to suggest otherwise, nothing in the plain meaning or object and purpose of the Convention suggests that the categorical ban in Article 49 was meant to include a *sub silentio* exception for aliens, whether legal or illegal. As Goldsmith acknowledges by not addressing the point, the term "protected persons" in Article 49, as elsewhere in Geneva IV, such as its Article 35 (which includes enemy aliens in occupied territory as "protected persons" and recognizes their right to leave voluntarily) presumptively includes all civilians who "inhabit" occupied territory, subject to clearly enumerated exceptions for nationals of the detaining power, of co-belligerent states, of states that are not parties to Geneva IV, or those who are "suspected of or engaged in" hostile activities.<sup>95</sup> As is clear from a comparison of the Convention's Article 27, which forbids adverse distinctions based on a number of characteristics but does not include nationality, with Articles 3 or 13, which forbid adverse distinctions based on, among other things, place of birth or nationality, the drafters of Geneva IV were well aware of the need to distinguish aliens from citizens when necessary and they did not do so in Article 49.<sup>96</sup>

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<sup>95</sup> Geneva IV, *supra* note 14, arts. 4, 5. Indeed, Article 49 itself, in forbidding an occupying power from "deport[ing] or transfer[ing] parts of its own civilian population into the territory it occupies," appears to make no distinction between the types of "civilians" being relocated. *Id.* art. 49.

<sup>96</sup> See also COMMENTARY ON GENEVA CONVENTION IV OF 1949, RELATIVE TO THE PROTECTION OF CIVILIAN PERSONS IN TIMES OF WAR 40 (ICRC, Jean S. Pictet ed., 1958) [hereinafter ICRC Commentary] (noting that Article 27's failure to include nationality reflects a recognition that certain security measures or administrative procedures may apply differently to non-citizens but that such "measures and procedures do not affect the treatment of individuals, which must be humane in all cases").

Goldsmith's efforts to import an alienage distinction into the term "deportation" is convincing only if one ignores, as he acknowledges, the usual use of the term under American law and Black's law dictionary.<sup>97</sup> Contrary to Goldsmith, there is no evidence that the drafters of article 49 ignored its plain meaning and imported only a narrow conception of "deportation" into Geneva IV. A plain meaning analysis does not support Goldsmith's interpretation and the principal materials available to assist interpretation, including the ICRC's commentary, do not support this limited view of the term. Although the memorandum cites the ICRC commentary for the proposition that "deportation" was meant to extend only to "inhabitants," the latter term, as Goldsmith also acknowledges, was used "loosely and interchangeably" to include members of the "population" of occupied territory.<sup>98</sup> Both the Commentary and relevant Nuremberg decisions use the term "inhabitants" to embrace all those who inhabit, that is any person who lives in a particular territory, whether or not they are citizens or legal or illegal aliens.

And even if Goldsmith were correct about the meaning of "deportation," he faces a problem in that the article 49 ban extends equally to "forcible transfers" and not merely deportations. As Goldsmith acknowledges, a basic canon of treaty interpretation urges treaty interpreters not to render treaty terms superfluous where another meaning might give them effect. Goldsmith argues, without any direct evidence, that the two terms were intended to be interchangeable and were not intended to provide any additional rights to protected persons.<sup>99</sup>

For these reasons, Goldsmith cannot base his strained interpretation of "forceful transfers," which literally would appear to apply to anyone who is involuntarily forced to leave a country, on the plain meaning of Article 49.

What then do we know of the historical context in which Article 49 was negotiated, which, as Goldsmith states, would clarify the object and purpose of the drafters? Although Goldsmith acknowledges that the prohibition on deportations from occupied territory has a history that pre-dates the atrocities of WWII, he dismisses that history in a single paragraph, and focuses instead on the particular acts of WWII because these "most directly

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<sup>97</sup> Memo 28, *supra* note 9, at 368. Goldsmith also fails to mention that the French and English versions of Geneva IV are equally authoritative. See Geneva IV, *supra* note 14, art. 150.

<sup>98</sup> *Id.* at 370 n.6.

<sup>99</sup> See 2 FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949 664 (1949) (noting that "in the last war the flower of Italian youth had been sent to Germany in cattle trucks. Such forced transfers must at all events be prohibited in the future. The term "deportation" in the last paragraph of the Article had better not be used, as "deportation" was something quite different") (statement by Italian Delegate M. Maresca).

inform" the text of Geneva IV.<sup>100</sup> Even assuming that Goldsmith is right that the negotiators of Geneva IV were narrowly focused on preventing what the Nazis did in the countries that they had occupied, Goldsmith's description of what the Nazis did is incomplete. He is correct that the Nazis tore people from their homes and caused them to disappear into the night, especially after their notorious Night and Fog decrees. But he is wrong to suggest that these horrific acts were limited to the nationals of the occupied territories or that the drafters were only horrified to the extent such acts were directed at such persons.

Nazi actions directed at people within occupied territories had been widely publicized by the time Geneva IV was negotiated. The Fog and Night campaigns and other forced labor practices had gathered international attention during the Nuremberg trials in which Nazi leaders such as Wilhelm Keitel publicly admitted complicity in such acts, under which "whole populations were deported to Germany for the purposes of slave labour upon defense works, armament production and similar tasks connected to the war effort."<sup>101</sup> It was well known that such horrors befell "whole" populations, including German aliens living in occupied territory, such as Anne Frank, living in the Netherlands.<sup>102</sup> At the time that the negotiations for Geneva IV were going on, evidence was being heard in Germany in the occupation trial of *United States v. Altstoetter*. That trial provided the most extensive coverage of the Nazi's Night and Fog policies, described as a plan or scheme to combat so-called resistance movements in occupied territories by enslaving, deporting, and imprisoning many thou-

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<sup>100</sup> Memo 28, *supra* note 9, at 369. But see DAVID KRETZMER, THE OCCUPATION OF JUSTICE: THE SUPREME COURT OF ISRAEL AND THE OCCUPIED TERRITORIES 45-52 (2002) (discussing the provision outlawing deportations in the Tokyo draft of the Convention for Protection of Civilians from 1934 and its impact on the draft text of Geneva IV). Kretzmer's account suggests that it would be wrong to assume that the prohibition in what came to be Article 49 was solely or primarily tied to Nazi deportations. Of course, even if Goldsmith and not Kretzmer were correct, Goldsmith cites nothing to indicate that the drafters of Geneva IV intended only to replicate and not to progressively develop the existing rules of international law.

<sup>101</sup> International Military Tribunal (Nuremberg), Judgment (Sept. 30, 1946), in CRIMES OF WAR 96 (Richard A. Falk et al. eds., 1971).

<sup>102</sup> Anne Frank's story, describing a forcible transfer of an alien from occupied territory, had made news by the time Geneva IV was negotiated, as it was first published in a Dutch newspaper *Het Parool* in 1946 and as a book, also in Dutch, in 1947. By 1948, more than 10,000 copies of Anne Frank's diary had been published, although it did not appear in German and French until 1950 and in English only in 1952. Anne Frank Museum, The Publication of the Diary, <http://www.annefrank.org/content.asp?pid=112&lid=2>. It is not clear that anyone focused on whether Anne Frank or her family were legal or illegal aliens under Dutch law or whether in forcibly transferring them from the Netherlands the Nazis formally applied Dutch immigration law. What was uppermost in most peoples' minds, one suspects, was that the Frank family, like many others, were forcibly taken from their home and what happened to them once they were in the hands of the occupying power.

sands of the civilian inhabitants of those territories, especially Jews and Poles, and by making these people disappear without a trace, thereby terrorizing into submission those left behind.<sup>103</sup> The description of these practices at this trial, undoubtedly known to the negotiators of Geneva IV, makes it clear that the Night and Fog tactics applied to all resisters of occupation and all others who incurred the wrath of the Nazis, irrespective of alienage or legal status and indeed often based on racial discrimination that served to target the Jewish inhabitants of the occupied territories, whether or not they were aliens or citizens. Contrary to what Goldsmith suggests, it is ahistorical to suggest either that the Nazi acts that were the focus of Article 49 targeted only legal aliens and citizens of occupied territories or that the drafters of Geneva IV were only concerned with such acts. As would be expected, delegate after delegate to Geneva IV focused on the abominable Nazi practices and sought to strengthen the interdictory provisions of Article 49.<sup>104</sup> The evidence suggests that the forcible, mass removal of entire groups, alien and citizen alike, that the Nazis in fact engaged in, not nice distinctions between the legal statuses of those forcibly transferred and tortured abroad, were foremost on their minds.

While it is possible that removal of illegal aliens by an occupying power consistent with local immigration law was simply not contemplated by the delegates, the same delegates were so acutely aware of the breadth of their prohibition in Article 49 that they carefully discussed possible exceptions and explicitly included, as part of Article 49, only two—permitting total or partial evacuation of a given area if security of the population or imperative military reasons so demand and imposing strict conditions intended to protect evacuees even in those circumstances.<sup>105</sup> The discussion of

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<sup>103</sup> See Altstoetter, *supra* note 20, at 1032-33, 1056-62.

<sup>104</sup> See, e.g., FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, *supra* note 99, at 664 (emphasizing the need to formally prohibit “deplorable practices . . . where men had been loaded into trucks like cattle, and sent to distant countries to do forced labour” and the need to “avoid mass transfers of the population, such as had taken place during the last war”) (statement by Soviet Delegate); *Id.* at 760 (condemning the numbers of women and children from Indonesia to perform forced labor abroad) (statement by Netherlands Delegate); *Id.* at 664 (noting that the Committee was unanimous in condemning “abominable practice of deportation” and the “sole purpose of every speaker had been to strengthen the interdictory provisions of the Article”) (statement by Chairman). Broad condemnation of all Nazi transfers from occupied territory, not distinctions between aliens and others, would appear to reflect the object and purpose of the drafters.

<sup>105</sup> Geneva IV, *supra* note 14, art. 49. The full text of Article 49 of Geneva IV:

Individual or mass forcible transfers, as well as deportations of protected persons from occupied territory to the territory of the Occupying Power to that of any other country, occupied or not, are prohibited, regardless of their motive.

Nevertheless, the Occupying Power may undertake total or partial evacuation of a given area if the security of the population or imperative military reasons so demand. Such evacuations may not involve the displacement of protected persons

these exceptions reveals drafters who were very wary of making exceptions to their ban on forcible transfers and keenly interested in protecting *all* civilians affected.<sup>106</sup> This is suggested, for example, in the provision in Article 49 requiring evacuees to be "transferred back to their homes as soon as hostilities in the area in question have ceased."

The negotiating history and language of the rest of Article 49 show that its drafters were quite concerned about ensuring that any exception to forcible transfers contain explicit guarantees to avoid abuse and to protect the interests of civilians. If the drafters intended to allow for an exception for the relocation of illegal aliens, as Goldsmith argues, one would expect to see it, along with some guarantees against abuse (such as assurances that such aliens are accorded some kind of due process or at least the process to which they are due under local law, that they are not being relocated to places that will harm them, and that they are being relocated due to the security or other needs of the occupied state and not solely for the benefit or at the say-so of the Occupying Power). While some such exception might have been desirable, there is no evidence it was contemplated.

Goldsmith's assertion that it makes no sense for Article 49 to permit illegal aliens to be imprisoned in occupied territory for violation of local immigration laws but not permit their deportation ignores the historical context. If as the Altstoetter case suggests, one of the problems with Nazi Night and Fog scheme was that it made it difficult to keep track of persons once they were removed from occupied territory, it makes sense to force an Occupying Power to go through a formal criminal or immigration process but not permit anything that could slide into secret disappearances in the dead

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outside the bounds of the occupied territory except when for material reasons it is impossible to avoid such displacement. Persons thus evacuated shall be transferred back to their homes as soon as hostilities in the area in question have ceased.

The Occupying Power undertaking such transfers or evacuations shall ensure, to the greatest practicable extent, that proper accommodation is provided to receive the protected persons, that the removals are effected in satisfactory conditions of hygiene, health, safety and nutrition, and that members of the same family are not separated.

The Protecting Power shall be informed of any transfers and evacuations as soon as they have taken place.

The Occupying Power shall not detain protected persons in an area particularly exposed to the dangers of war unless the security of the population or imperative military reasons so demand.

The Occupying Power shall not deport or transfer parts of its own civilian population into the territory it occupies.

*Id.*

<sup>106</sup> See, e.g., FINAL RECORD OF THE DIPLOMATIC CONFERENCE OF GENEVA OF 1949, *supra* note 99, at 760 (comments of Danish delegate on the object and purpose of the evacuation provisions); see also ICRC Commentary, *supra* note 96, at 280.

of night. Geneva IV insists on such process to permit detention within occupied territory and, as is clear from its Article 45, precludes deportation or transfer unless a protected person (1) is accused of an ordinary crime and (2) is extradited pursuant to an extradition treaty that had been in place prior to the outbreak of hostilities.<sup>107</sup> The same concern with process appears in the provision that Goldsmith mentions, Article 76(1), which otherwise bars those formally accused of crimes from being removed from occupied territory.<sup>108</sup>

For these reasons, Goldsmith's attempts to read illegal aliens out of the protections of Article 49 are contrary to the plain meaning, object and purpose, and context of Geneva IV.

Goldsmith's second conclusion, that despite the categorical ban on transfers and deportations in Article 49, anyone in occupied territory, including aliens and citizens, can be taken out of occupied territory for some unspecified time to be interrogated at the behest of the Occupying Power, is even more implausible. Again, Goldsmith reads this exception, nowhere suggested by the plain terms of Article 49, into the words "deportation" and "transfer." Again, he can get no help from dictionary definitions since, as he acknowledges, the plain meaning of "transfer" is to remove from one place to another, even for a temporary period of time.<sup>109</sup> Again, he argues that the ban on "forcible transfers" should effectively be read out of Article 49. But in this case, Goldsmith's interpretation of "transfer" to mean only permanent or indefinite resettlement is belied by the terms of Article 49 itself, since its second paragraph, providing a guarantee that evacuated persons "be transferred back to their homes as soon as hostilities in the area in question have ceased" expressly calls such temporary evacuations "transfers" and requires these to be as short as possible. The drafters of Article 49 obvi-

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<sup>107</sup> Geneva IV, *supra* note 14, art. 45 ("the provisions of this Article [precluding transfer to another power] do not constitute an obstacle to the extradition, in pursuance of extradition treaties concluded before the outbreak of hostilities, of protected persons accused of offences against ordinary criminal law").

<sup>108</sup> Memo 28, *supra* note 9, at 374-75, 379 (suggesting that the procedural protections that attach to suspected offenders after they have been accused triggers special concerns). Oddly, Goldsmith does not mention Article 45 of Geneva IV which permits extradition of those accused of ordinary crimes if pursuant to a pre-existing extradition treaty. It might be argued that given the special concerns prompted by a determination that someone is an "illegal" alien, including the worry that such a determination might be pretextual in the special circumstances of an occupation that is resisted by the local population and the worries, prompted by then recent Nazi policies, of what may befall such hapless refugees once removed from the country in which they reside, the drafters of Geneva IV would opt to limit the discretion of an Occupying Power to remove such individuals from occupied territory unless they have been charged with an ordinary crime and extradited to a country that will not persecute them pursuant to an extradition treaty. See Geneva IV, *supra* note 14, art. 45.

<sup>109</sup> Memo 28, *supra* note 9, at 375.



ously used the word "transfer" to mean what its plain meaning suggests, that is any removal even for a temporary period.

In this instance as well, Goldsmith attempts to draw support for his strained interpretation from the Nazi policies that were allegedly the target of Article 49. He suggests that these involved, exclusively, the resettlement of the inhabitants of occupied territory elsewhere for a "permanent, extended, or at least indefinite duration."<sup>110</sup> But there was abundant evidence, widely known to the negotiators of Geneva IV, that Nazi transfer policies, especially under their Night and Fog decrees, were not limited to "permanent, extended, or at least indefinite resettlement." As was made crystal clear in the Altstoetter trial proceedings, although the Nazis exterminated many of those that they removed from occupied territory, their Night and Fog policies extended to vast numbers of persons who were removed in secret from occupied territories, subjected to "brutal third degree methods" of interrogation, but who were detained abroad only for varying periods of time.<sup>111</sup> The evidence presented at trial showed "that many of the Night and Fog prisoners who were deported to Germany were not charged with serious offenses and were given comparatively light sentences or acquitted."<sup>112</sup> Indeed, the directive that was the subject of criminal charges against the Nazi Minister of Justice explicitly provided that if a transferred person was found innocent it would be up to the Secret Police to decide "whether the accused can be released and return[ed] into the occupied territories," while others could be handed over to the Secret Police "for detention for the duration of the war."<sup>113</sup> It is also clear from the judgment of these tribunals that the central concern of the judges, and presumably of those who drafted Article 49, was not the length of time a transferred person was kept outside of occupied territory but the inhuman treatment suffered by those who were removed (including during their periods of detention and interrogation), the discriminatory policies that led to his being selected for transfer, the secrecy of the process of removal, the cruel "terrorist" impact on those left behind, as well as, of course, that for some, secret removal, even for a short period, meant death.<sup>114</sup>

The tribunals associated the secret transport of the inhabitants with the "torture of civilians by the occupying forces,"<sup>115</sup> precisely because this is what the Nazis did. They enforced Control Council Law No. 10 (which barred deportation of the civilian population from occupied territory "to

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<sup>110</sup> *Id.* at 378.

<sup>111</sup> Altstoetter, *supra* note 20, at 1056.

<sup>112</sup> *Id.* at 1058.

<sup>113</sup> *Id.* at 1052.

<sup>114</sup> See, e.g., *id.* at 1031-62.

<sup>115</sup> See *id.* at 1061.

slave labour or for any other purpose”) precisely because, as the Nuremberg tribunal had held, the removal of inhabitants from occupied territories for the purpose of “efficient and enduring intimidation” constituted a violation of the laws and customs of war.<sup>116</sup>

For anyone grounded in the history with which this treaty was intended to deal, it is absurd to contend that the object and purpose of Article 49 (or of Geneva IV generally) was to *cut back* on the protections recognized at Nuremberg and the occupation trials and permit an occupying power to transfer any and all individuals abroad to places unknown for purposes of interrogation. As with respect to the contention that illegal aliens were not intended to be protected, one would expect such an extraordinary exception to the clear prohibitory words of the first sentence in Article 49 to appear alongside the other limited exceptions provided in the rest of Article 49 if it had been at all anticipated. Such an exception, like those that are addressed in the second through fourth paragraphs of Article 49, would also have included guarantees against abuse (such as providing that transfers not be to places where maltreatment was likely or probable). The premise that the drafters of Article 49 would have approved of a free-floating exception for short-term relocations that could only be of benefit to the Occupying Power, while ignoring explicit safeguards to prevent abuse of those forcibly removed to “facilitate interrogation,” is inconsistent with the whole of Article 49 and the convention’s object and purpose.<sup>117</sup>

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<sup>116</sup> *Id.* at 1057. Indeed one of the reasons that Schlegelberger, the Minister of Justice, was convicted at this trial was precisely that he was instrumental in quashing the proceedings against a police officer who allegedly obtained a confession by beating a prisoner. *Id.* at 1085-86.

<sup>117</sup> Goldsmith’s interpretation also renders the war crime defined in Article 49 unnecessarily ambiguous. Memo 28, *supra* note 9. As he acknowledges in a footnote, his free-floating exception does not provide precise guidance as to how long a protected person may be held outside occupied territory before a grave breach of Geneva IV may be deemed to have been committed. *Id.* at 379 n.14. Although Goldsmith offers to provide “additional guidance” as necessary on this point, the effect of Goldsmith’s interpretation is to turn a relatively clear war crime that, as originally stated, gave clear notice that a crime is committed when a definitive act occurs (namely when persons are removed from occupied territory) to one that might be committed at some indefinite time in the future to be defined on a “case by case” basis by Goldsmith and other government attorneys. This renders the intended protection given to individuals in occupied territory less predictable and subject to subjective discretion by the occupier, transfers a cognizable war crime into an vague injunction that may violate the principle of *nullem crimen sine lege*, and makes government officials that might be accused of grave breaches of Article 49 judges in their own cause. *Cf.* Staples v United States, 511 U.S. 600, 619 (1994) (lenity requires that ambiguous criminal statutes be construed in favor of the accused); Waldron, *supra* note 11 (arguing that the demand for precision on the degree of “severity” needed to constitute torture in the Bybee/Yoo memorandum is intended precisely to exploit the rule in Staples for the benefit of the state). Indeed, the rule of lenity is deployed precisely to this effect in one of the most notorious of the torture memoranda, Bybee’s January 22, 2002 memorandum to Gonzales. *See* Memo 6, *supra* note 15, at 83 n.4.

Goldsmith's other stated reason for an interpretation that is so at odds with plain meaning and object and purpose is that a more literal interpretation of Article 49 would make Articles 51 and 76, which address the abuse of those convicted of crimes and the use of slave labor, superfluous. This argument is specious. As he acknowledges but chooses to dismiss, this contention ignores the ICRC commentary indicating that these additional guarantees were included out of an abundance of caution.<sup>118</sup> Articles 51 and 76 were intended to reinforce Article 49's provisions by targeting specific Nazi abuses.<sup>119</sup> These specific guarantees were, like Article 49 itself, grounded in the Nazi abominations canvassed at Nuremberg and the occupation trials and were separately mentioned precisely because, as delegates to this negotiation repeatedly stated, their governments as well as people around the world expected Geneva IV to indicate clearly that such acts would themselves violate international law. In addition, as in the case of Article 51 (regarding slave labor), they wanted to ensure that some violations would also constitute distinct "grave breaches" chargeable as distinct war crimes, quite apart from the act of forcibly transferring persons from occupied territories.<sup>120</sup> Insofar as such provisions were intended to guide a war crimes prosecutor and to stigmatize these distinct acts as separate international crimes or breaches of treaty law, they are not superfluous.

For all these reasons, the Goldsmith memorandum also tortures the law of treaties, albeit with more subtlety than some of the other torture memoranda.

## VI. THE BROADER CONTEXT OF THE GOLDSMITH MEMORANDUM

The timing of the Goldsmith memorandum, March 19, 2004, provides some necessary context. Goldsmith drafts his opinion in the wake of the February 2004 Report of the International Committee of the Red Cross ("ICRC"), which documented numerous apparent violations of Geneva law during the arrest, internment and interrogation of detainees in occupied Iraq,<sup>121</sup> and amid growing news reports of abuses and even deaths while

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<sup>118</sup> See Memo 28, *supra* note 9, at 379 n.13.

<sup>119</sup> ICRC Commentary, *supra* note 96, at 279, 363.

<sup>120</sup> See Geneva IV, *supra* note 14, art. 147 (including as a grave breach "compelling a protected person to serve in the forces of a hostile Power"). See also Rome Statute, *supra* note 62, art. 8(2)(a)(v) (recognizing the war crime of compelling a POW or other protected person to serve in the forces of a hostile Power) and art. 8(2)(a)(vii) (recognizing war crime of unlawful deportation or transfer or unlawful confinement).

<sup>121</sup> This Report was not made public until November 2004, the same month when the existence of the Goldsmith memorandum was made public. For the text of the ICRC Report, see REPORT OF THE INTERNATIONAL COMMITTEE OF THE RED CROSS (ICRC) ON THE TREATMENT BY THE COALITION FORCES OF PRISONERS OF OTHER PROTECTED PERSONS BY THE GENEVA CONVENTIONS IN IRAQ DURING ARREST, INTERNMENT AND INTERROGATION (Feb. 2004), *re-*

under U.S. detention elsewhere.<sup>122</sup> His memorandum is also contemporaneous with the first investigative report, by the U.S. government itself, of detainee abuses in Iraq, the Taguba Report.<sup>123</sup> At the same time, Goldsmith's memorandum precedes by a month the public revelation of the infamous photos at Abu Ghraib and the subsequent leaking of the many torture memoranda that make up *The Torture Papers*. Yet, by the time Goldsmith is asked his opinion, it is too late for the Administration to back away from its public position, affirmed by the Security Council, that Geneva law unques-

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printed in TORTURE PAPERS, *supra* note 1, at 383 [hereinafter ICRC Report]. This Report describes the pattern of arrests in occupied Iraq by U.S. personnel the following way:

Arresting authorities entered houses usually after dark, breaking down doors, waking up residents roughly, yelling orders, forcing family members into one room under military guard while searching the rest of the house and further breaking doors, cabinets, and other property. They arrested suspects, tying their hands in the back with flexi-cuffs, hooding them, and taking them away. Sometimes they arrested all adult males present in a house, including elderly, handicapped or sick people. Treatment often included pushing people around, insulting, taking aim with rifles, punching and kicking and striking with rifles. Individuals were often led away in whatever they happened to be wearing at the time of arrest—sometimes in pajamas or underwear—and were denied the opportunity to gather a few essential belongings, such as clothing, hygiene items, medicine, or eyeglasses . . .

In almost all instances documented by the ICRC, arresting authorities provided no information about who they were, where their base was located, nor did they explain the cause of arrest. Similarly, they rarely informed the arrestee or his family where he was being taken and how long, resulting in the de facto "disappearance" of the arrestee for weeks or even months until contact was finally made.

When arrests were made in the streets, along the roads, or at checkpoints, families were not informed about what had happened to the arrestees until they managed to trace them or received news about them through persons who had been deprived of their liberty but were later released, visiting family members of fellow persons deprived of their liberty, or ICRC Red Cross Messages. In the absence of a system to notify the families of the whereabouts of their arrested relatives, many were left without news for months, often fearing that their relatives unaccounted for were dead.

*Id.* at 388-89.

This report also includes an extensive list of the types of ill-treatment reported during detainee interrogations and indicates that the physical and psychological coercion involved "in some cases might amount to torture." *Id.* at 391-93. It also includes warnings that certain methods of confinement, such as prolonged solitary confinement in cells devoid of sunlight for 23 hours a day, violate Geneva III and IV. *Id.* at 398.

<sup>122</sup> See *Two Inmate Deaths at U.S. Base Ruled Homicides*, L.A. TIMES, Mar. 6, 2003, § 1, at 14; Jess Bravin & Gary Fields, *How Do U.S. Investigators Make a Captured Terrorist Talk?*, WALL ST. J., Mar. 4, 2003, at B1; Van Natta, Jr., *supra* note 8; Press Release, Human Rights Watch, United States: Reports of Torture of Al-Qaeda Suspects (Dec. 27, 2002), available at <http://www.hrw.org/press/2002/12/US1227.htm>.

<sup>123</sup> ANTONIO M. TAGUBA, MAJOR GEN., U.S. DEP'T OF THE ARMY, ARTICLE 15-6 INVESTIGATION OF THE 800TH MILITARY POLICE BRIGADE, reprinted in TORTURE PAPERS, *supra* note 1, at 405 [hereinafter TAGUBA REPORT].

tionably extends to Iraq. Unlike Bybee and Yoo, Goldsmith does not have the option of simply declaring Geneva IV inapplicable to Iraqi detainees because this is a new kind of occupation involving "terrorists" or "unlawful combatants."<sup>124</sup>

Goldsmith's memorandum is written at a time when it was becoming ever more probable that U.S. personnel would face disciplinary proceedings (at least for the abuses that were the subject of the Taguba Report) and where, therefore, U.S. soldiers themselves would be increasingly likely to raise questions should they witness continuing maltreatment of Iraq prisoners.<sup>125</sup> Goldsmith is asked to express his opinion about whether it is legal for the U.S. to remove individuals from Iraq for purposes of interrogation precisely at a time when there is increasing scrutiny and growing public distrust about U.S. interrogation methods inside Iraq; when, in short, the possibility of continuing maltreatment of Iraqi detainees is becoming untenable both as a legal and as a public relations matter.

Given the revelations of U.S. abuses of detainees then becoming public, it is difficult to believe that Goldsmith could have been unaware of the uses to which his arguments might be put. While there may indeed be some legitimate reasons for interrogating some persons outside Iraq, the most obvious reasons do so—and to demand a detailed legal memorandum from the Office of Legal Counsel for this purpose—is precisely to avoid the scrutiny that interrogations inside Iraq would present or to use foreign personnel to engage in interrogations under conditions that would be deemed objectionable if undertaken by U.S. personnel. Both before and certainly after Goldsmith writes his memorandum, there were growing and widely available reports, in the press and by human rights groups, that the United States appeared to be "outsourcing" torture (and other forms of coercive interrogation techniques) by sending those it suspected of being involved in terrorism to countries that the State Department itself has identified as regular practitioners of torture, including Egypt, Jordan, Morocco, Saudi Arabia,

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<sup>124</sup> Indeed, only a few days after the Goldsmith memorandum, John Yoo opined in the *Wall Street Journal* that while Geneva law operates in Iraq, it has no operation in the broader war against terrorism. John Yoo, *Terrorists Have No Geneva Rights*, WALL ST. J., May 26, 2004, at A16.

<sup>125</sup> See, e.g., Geneva IV, *supra* note 14, art. 31 ("no physical or moral coercion shall be exercised against protected persons, in particular to obtain information from them or from third parties"); *Id.* art. 32 (banning "any measures of brutality" whether applied by civilian or military agents). For just such an incident, see *Torture by Proxy*, *supra* note 9, at 17 (reporting an instance in which U.S. National Guard soldiers on patrol encountered a walled compound with dozens of abused Iraqi detainees and set out to rescue them only to be told to withdraw and to return the detainees to their Iraqi jailers). Indeed, if press reports are accurate, Goldsmith's own actions in rejecting the recommendations of the earlier Bybee/Yoo memoranda may have made it more difficult for U.S. personnel themselves to engage in the harsh interrogation tactics banned by existing law. See Klaidman et al., *supra* note 93.

Yemen, and Syria.<sup>126</sup> Indeed, five days after Goldsmith writes his memorandum, on May 24, 2004, Newsweek reported that the United States was allegedly running a covert charter airline to move CIA prisoners from one secret facility to another.<sup>127</sup> While the United States has never confirmed the accuracy of these reports, by the time Goldsmith was asked for his opinion, there had been numerous public statements by various U.S. government officials that are consistent with a policy of relying on others to undertake forms of interrogation that the U.S. government had been required to fore-swear in the glare of Abu Ghraib, particularly within Iraq.<sup>128</sup>

Although the Goldsmith opinion is, according to its precise terms, limited to the rare case where the U.S. government is an occupying power (namely Iraq),<sup>129</sup> a legal opinion that concludes that our government can seize anyone that it wishes from territory over which it exercises de facto control and can transfer such individuals to places unknown for unspecified periods of time for purposes of interrogation, encourages such transfers generally and has broader implications. At a minimum, it gives U.S. interrogators an additional illegal tool: the threat to send any detainee abroad to places where he will be tortured by others.<sup>130</sup> The potential for grave human rights abuses is particularly evident when the same government that is given this license had not, at least at the time this memorandum was written, yet publicly renounced the absurdly narrow definition of torture in the By-bee/Yoo memoranda and later, when it does so, only affirms that "United

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<sup>126</sup> See Torture by Proxy, *supra* note 9, at 8. Even if at the time he wrote his memorandum Goldsmith was unaware of the Bybee/Yoo torture memoranda, he surely was aware of these media reports.

<sup>127</sup> Jon Barry et al, *supra* note 12. On the same date, Seymour Hersh reported that extraordinary renditions were part of a special access program (SAP) approved at the highest levels of the Bush Administration involving forceful interrogations by highly trained U.S. commandos and operatives at secret detention centers scattered around the world. Seymour M. Hersh, *The Gray Zone: How a Secret Pentagon Program Came to Abu Ghraib*, NEW YORKER, May 24, 2004, at 42 [hereinafter Hersh, *The Gray Zone*]. See also Seymour M. Hersh, *Chain of Command: How the Department of Defense Mishandled the Disaster at Abu Ghraib*, NEW YORKER, May 17, 2004, at 38 (2004). If true, transfers from Iraq and elsewhere may be resulting in violations of the ban on torture and inhuman treatment by the U.S. itself, and not just the outsourcing of such methods.

<sup>128</sup> For examples of such public statements, see Torture by Proxy, *supra* note 9, at 5, 13-15. See also *id.* at 9-13 (citing numerous examples identified in that report of particular individuals allegedly transferred from 1995 to 2002 to places likely to torture them).

<sup>129</sup> But note that even with respect to Iraq, the Goldsmith memorandum potentially affects a much larger number of people than, for example, Guantánamo. See, e.g., Matt Kelley, *Number of Prisoners Held by U.S. in Iraq Doubled in Five Months*, AP WORLDSTREAM NEWSWIRE, Mar. 30, 2005, Westlaw, APWORLD database (reporting that the U.S. was holding 10,500 persons in Iraq).

<sup>130</sup> See, e.g., Parry, *supra* note 8, at 250 (citing media reports of such threats by U.S. interrogators).

States personnel" do not engage in torture while continuing to hedge on the use of cruel, inhuman and degrading treatment at least with respect to those held outside the United States.<sup>131</sup>

If the Goldsmith memorandum continues to reflect existing U.S. policy, the Administration's renunciations of the Bybee/Yoo view of torture are hollow indeed, amounting to a statement that U.S. government officials will not themselves engage in certain interrogation techniques (at least inside U.S. territory) but will not seek to prevent others to whom it transfers people from doing so (and may in fact be engaged in such transfers anticipating just such an outcome). If, even in the context of Iraq, a country that at least at the time the Goldsmith memorandum was written was unquestionably subject to Geneva law and remains the focus of intense media and UN scrutiny, we insist on our right to transfer any and all individuals to "facilitate interrogation" to other countries, is it realistic to expect that we are not engaged in outsourcing torture elsewhere where we face not the reciprocal rules of Geneva but only the constraints of human rights instruments (such as the Torture Convention, the Refugee Convention, the ICCPR, and the Universal Declaration of Human Rights) that the Administration's other memoranda suggest do not really have the force of law?

The Goldsmith memorandum adheres to the pattern of the rest of *The Torture Papers*. Like the more notorious memoranda in that collection, it too gives the executive's architects of the U.S. "war" on terrorism "the benefit of the doubt on issues of intent and criminal responsibility while at the same time eagerly denying such accommodations to those at whom the policies were directed."<sup>132</sup> It too denies the equal application of the law and has a deaf ear for legal conclusions that encourage national, ethnic, or religious discrimination.<sup>133</sup> Like the other torture memoranda, Goldsmith's adheres to a depressingly familiar formula: (1) find a location that is relatively impervious to judicial scrutiny, (2) deflect, rescind or avoid Geneva law, and (3) provide a legal interpretation that protects U.S. personnel from criminal prosecution (if only by turning a previously precise war crime into a vague one subject to the rule of lenity).<sup>134</sup> If the Bybee/Yoo memoranda inevitably led to abuses within U.S. custody (as journalists like Seymour Hersh have forcefully contended based on anonymous government

<sup>131</sup> Comey Memo, *supra* note 23, at 2. Indeed, even after issuing this new memorandum, Bush Administration officials continued to resist Congressional attempts to extend the President's ban on inhumane treatment to employees of the CIA. See Amann, *supra* note 13, at 2100, 2100 n.57. For suggestions in the media that Goldsmith's memorandum was connected to reports of "ghost detainees" from Iraq, see Dana Priest, *Memo Lets CIA Take Detainees Out of Iraq*, WASH. POST, Oct. 24, 2004, at A1.

<sup>132</sup> Joshua L. Dratel, *The Legal Narrative*, in TORTURE PAPERS, *supra* note 1, at xxi.

<sup>133</sup> *Id.*

<sup>134</sup> *Id.* at xxii. See also Memo 6, *supra* note 15, at 83 n.4 (discussing the rule of lenity).

sources),<sup>135</sup> the Goldsmith memorandum may have become a roadmap to the outsourcing of torture and other forms of abuse.

As others have addressed in detail, numerous treaty obligations of the United States—namely the Geneva Conventions of 1949, the ICCPR, the Torture Convention, and the Refugee Convention—prohibit the refolement or transfer of an individual to another state where that person faces the danger or risk of torture.<sup>136</sup> That obligation also exists under customary law and some of these treaties also require such “extraordinary renditions” to be criminalized.<sup>137</sup> The tests for determining when the refolement prohibition operates vary. Under the Torture Convention the ban exists where there is a “substantial likelihood” that the transferred individual “may be in danger of torture.”<sup>138</sup> As interpreted by the Human Rights Committee, the ICCPR bans such transfers where the transferees may be at “real risk” of either torture or cruel, inhuman or degrading treatment.<sup>139</sup> For its part the Refugee Convention protects individuals with a “well-founded fear of persecution” on specific enumerated grounds.<sup>140</sup> As the Goldsmith memorandum acknowledges (albeit in a brief footnote), violation of Article 49 of Geneva IV constitutes a “grave breach” and is therefore a war crime.<sup>141</sup> In addition, U.S. law makes it a federal crime to commit, attempt to commit, or conspire to commit an act of torture outside the United States.<sup>142</sup>

<sup>135</sup> See Hersh, *The Grey Zone*, *supra* note 127. See also *The Road to Abu Ghraib*, HUMAN RIGHTS WATCH, June, 2004, <http://www.hrw.org/reports/2004/usa0604/>.

<sup>136</sup> See generally *Torture by Proxy*, *supra* note 9 (surveying non-refoulement treaty obligations). See also *Chahal v. United Kingdom*, 23 Eur. Ct. H.R. 413 (ser. A) (1996). For discussion of the absolute nature of the non-refoulement obligation in Article 3 of the Torture Convention, see *Torture by Proxy*, *supra* note 9, at 82-83 (discussing international decisions that apply in the context of terrorism and describing the prohibition as a *jus cogens* norm).

<sup>137</sup> *Torture by Proxy*, *supra* note 9, at 31.

<sup>138</sup> Torture Convention, *supra* note 14, art. 3(1). See also *Torture by Proxy*, *supra* note 9, at 36-37.

<sup>139</sup> See, e.g., *Torture by Proxy*, *supra* note 9, at 54-56 (discussing the Human Rights Committee’s interpretation of Article 7 of the ICCPR and suggesting that the “real risk” standard requires a higher showing than the Torture Convention’s “in danger of” standard).

<sup>140</sup> Refugee Convention, *supra* note 14, art. 33(1). See also *Torture by Proxy*, *supra* note 9, at 68-69.

<sup>141</sup> Memo 28, *supra* note 9, at 379 n.13 (noting Article 147 of Geneva IV). As is suggested by the statutes for the ad hoc war crimes tribunals in Rwanda and the former Yugoslavia and judgments issued by these tribunals, “grave breaches” of Geneva law also constitute war crimes under customary international law. See, e.g., *Torture by Proxy*, *supra* note 9, at 67, 67 n.364-65.

<sup>142</sup> 18 U.S.C. § 2340A(a) (2000). See *Torture by Proxy*, *supra* note 9, at 49-50. But while U.S. regulations implement the Torture Convention’s non-refoulement obligation by requiring certain determinations to be made prior to removal or transfer of individuals from the territory of the United States, these do not apply to persons being transferred by, or with the complicity of, U.S. actors outside the United States to third states. See *id.* at 50-54 (contend-



The Goldsmith memorandum barely says a word about any of these obligations. It merely concludes that Geneva's non-transfer obligation does not apply either to illegal aliens or to others removed from occupied Iraq for temporary periods.<sup>143</sup> Of course, all of the obligations surveyed above become highly relevant to the extent the memorandum's conclusions are erroneous. Nonetheless, it might be suggested that since the Goldsmith memorandum does not itself anticipate that "facilitating interrogation" will facilitate the infliction of torture or other forms of cruel treatment, it would be unfair to classify the Goldsmith memorandum, alongside the Bybee/Yoo memorandum, as part and parcel of a broader U.S. conspiracy to commit torture, especially if transfer from Iraq is intended precisely to permit interrogation by non-U.S. officials.<sup>144</sup>

I leave to others to consider whether U.S. officials are less *morally* culpable when their role is limited to making persons available to others whom it expects will abuse or even torture the transferred individuals. But even assuming this were true, the subcontracting of torture to non-U.S. officials has its own nefarious effects. Given the United States' leadership position with respect to showing the world what measures can be legally taken in the "war" on terrorism, when U.S. officials acquiesce in such activity by others, enable such activity to take place, or use information obtained elsewhere by improper methods, it is suggesting, in a manner that is inevitably known to other governments, that such measures can be taken and will not be penalized. The United States' subcontracting of torture undermines the ban on torture and inhuman treatment no less than if it were engaging in such activity itself. It is difficult to maintain that these prohibitions are *erga omnes* obligations if all we are saying is that *we* do not do them. Of course, the U.S. subcontracting example may prove influential to others with a reputation for relatively strong compliance with human rights norms.<sup>145</sup> In

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ing that this regulatory gap constitutes a breach of U.S. obligations to fully implement the torture convention).

<sup>143</sup> See Memo 28, *supra* note 9.

<sup>144</sup> Indeed, as noted at *supra* note 93, there are unconfirmed reports that Goldsmith himself may have played a prominent role in convincing the Administration to renounce the harsh interrogation techniques condoned by the earlier Bybee/Yoo memoranda. See Posting of Marty Lederman, *Silver Linings (or, the Strange But True Fate of the Second (or was it the Third?) OLC Torture Memo*, <http://balkin.blogspot.com/2005/09/silver-linings-or-strange-but-true.html> (Sept. 21, 2005, 18:08 EST).

<sup>145</sup> See, e.g., Clifford Krauss, *Evidence Grows that Canada Aided in Having Terrorism Suspects Interrogated in Syria*, N.Y. TIMES, Sept. 17, 2005, at A7 (describing inquiry into Canadian use of information allegedly obtained from four Canadian citizens under torture). Of course, to the extent the U.S. engages in such behavior it is sending clear messages about how best to evade the letter of the law while violating its spirit. See, e.g., Torture by Proxy, *supra* note 9, at 15, 29-30 (noting that despite apparent strictures on the CIA from engaging in, providing advice about, or encouraging the use of torture, there are media reports that the CIA is in fact using a narrow definition of what counts as "knowing," such that it is not

any case, as noted above, international criminal principles of complicity, conspiracy, and aiding and abetting anticipate criminal liability for knowing acquiescence in illegal activity by others, even if the principal perpetrator is unidentified or if their guilt cannot be proven, and even if the accomplice did not “wish” that the principal offense be committed.<sup>146</sup> International criminal law also anticipates command responsibility for the outsourcing of torture.<sup>147</sup>

## VII. TORTURING THE RULES OF PROFESSIONAL RESPONSIBILITY

The Goldsmith memorandum shares one other feature with the other torture memoranda. It reflects a mode of lawyering that tortures the rules of professional responsibility. It too is a public stain on the already dubious reputation of lawyers. Like the Bybee/Yoo memoranda, the Goldsmith memorandum reflects a result-oriented approach in which the government lawyer whose advice is sought starts with the objective that the lawyer believes the client wants and works backward to achieve it, even at the expense of the law itself.<sup>148</sup>

The Goldsmith memorandum, like most of the other torture memoranda, consists of lawyers’ advice with respect to actions that their clients are contemplating (and perhaps have begun to undertake). This memorandum, like the others, was not drafted for purposes of public consumption. But the fact that these memoranda were never intended to be published on the front page of the *New York Times* (as many of them ultimately were) and that presumably they would have been written differently if their authors had anticipated publication is hardly an exculpatory fact. On the contrary, that they were written in confidence by lawyers to their clients is all the more reason to expect that these memoranda would frankly acknowledge that law is a system of constraints and that lawyerly advice most often consists of informing clients about these constraints—and not in pretending that such constraints do not exist simply because they get in the way of what the client wants to achieve. Legal memoranda written with due regard for the rules of professional responsibility would have provided their intended

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“knowing” when the CIA is not physically in the room where the torture occurs but may be feeding the questions to the interrogators or even be observing the interrogations through one-way mirrors). Cf. Report of the Special Rapporteur on Torture, *supra* note 40, ¶¶ 15, 19 (condemning the commission of torture at the instigation of or with the consent or acquiescence of a public official, and including acts by private contractors). Such behavior, by the supposed exemplar of human rights norms, does grave damage to U.S. foreign policy interests.

<sup>146</sup> See, e.g., *Torture by Proxy*, *supra* note 9, at 71 n.390 (citing *Prosecutor v. Akayesu*, Case No. ICTR-96-4-T, Judgment (Sept. 2, 1998)).

<sup>147</sup> See *id.* at 74-76.

<sup>148</sup> See, e.g., Dratel, *supra* note 132, at xxii.

recipients with considerably different, or at least considerably more cautious or nuanced, advice.

The Model Rules of Professional Conduct require lawyers to give candid, independent and professional, not sycophantic, advice.<sup>149</sup> To the extent the memoranda assume, as many of them do, that the client was seeking legal help before taking action or making public announcements in reliance upon the advice, they should have candidly warned the relevant government officials not only about the risk of criminal prosecutions under U.S. law but the risk of civil liability for the U.S. government under established rules of state responsibility. Goldsmith should not have been principally concerned that if he told his superiors that transferring individuals from Iraq would be illegal, he would have made it more difficult for them to engage in coercive interrogation techniques that they wished to use given the intense glare of media attention within Iraq. Indeed, given the law, his job was precisely to make taking this option more difficult or at least to warn the executive branch of the highly controversial and tenuous nature of the interpretation sought with respect to Article 49.

As Harold Koh and others have noted, all of these memoranda, including Goldsmith's, tortured the rules of professional conduct insofar as they told the clients only what the lawyer believed the client wanted to hear. They did not enable the client to make an intelligent and informed decision on the basis of real, not fanciful, law.<sup>150</sup> To this extent, the torture memoranda writers failed their clients by not fully and frankly explicating the law.

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<sup>149</sup> See, e.g., Koh, *supra* note 13, at 654 (citing MODEL RULES OF PROF'L CONDUCT R. 2.1 (2004)). But see Editorial, *The Torture Canard*, WALL ST. J., June 11, 2004, at A8 (explaining that the torture memoranda "do what good lawyers do . . . advance the arguments that give their clients the maximum policy discretion. All the more so given that international courts and human-rights groups are only too eager to allege war crimes against Americans"). One would have thought, on the contrary, that the role of good government attorneys, especially when being asked about contemplated government action, would be to warn their clients precisely about the risks posed by international law and human rights advocates so that neither they, nor the nation, are compromised.

<sup>150</sup> Koh, *supra* note 13, at 655. See also Dratel, *supra* note 132, at xxii ("slavish dedication to a superior's imperatives does not serve the client well in the end and reduces the lawyer's function to that of a gold-plated rubber stamp"). As the Wall Street Journal indicated, ironically in defending the torture memoranda, they "make the legal case for why the President is not bound by international treaties or federal law regarding the treatment of certain detainees in the war on terror." *The Torture Canard*, *supra* note 149. This is precisely what is wrong from a professional standpoint about them. The Journal editorial writers, like the writers of the memoranda themselves, appear to confuse the role of a defense attorney after her client has been charged with a war crime from the role of lawyer being consulted in anticipation of action that might amount to a war crime. Cf. MODEL RULES OF PROF'L CONDUCT R. 3.1 (2004) (rules for advocates), and MODEL RULES OF PROF'L CONDUCT R. 3.1 cmt. 2 (2004) (advocates have duty to use legal procedure and lawyers "can make good faith arguments in support of their clients' positions. . . even though the lawyer believes that the client's posi-

The Goldsmith memorandum affects scholarly detachment.<sup>151</sup> It focuses like a laser beam on the narrowing parsing of two words, ignoring all other legal, moral, economic, or social considerations. As Richard Bilder and Detlev Vagts have suggested, this is not a virtue but suggests another departure from the Rules of Professional Responsibility, which urge lawyers to consider the “moral, economic, social and political factors that may be relevant to the client’s situation.”<sup>152</sup> While we do not know whether in subsequent drafts or in other memoranda that have not been made public Goldsmith or other government lawyers provided the needed context or even renounced their prior views, the March 19, 2004 memorandum does not remind its recipient, the Attorney General, that should the United States transfer either illegal aliens or others from Iraq it would need to, in any case, consistent with the rest of Geneva law, inform the International Red Cross of such transfers and not do so secretly.<sup>153</sup> Given the contemporaneous allegations of U.S.-government sponsored “disappearances” or “phantom” or “ghost” detainees,<sup>154</sup> one would have thought that a lawyer providing a potential roadmap for such acts would have at least reminded his client that transfers from Iraq, should they take place, cannot be in secret or in the

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tion ultimately will not prevail”), with MODEL RULES OF PROF’L CONDUCT R. 2.1 (2004) (rules for counselors), and MODEL RULES OF PROF’L CONDUCT R. 2.1 cmt. 1 (2004):

A client is entitled to straightforward advice expressing the lawyer’s honest assessment. Legal advice often involves unpleasant facts and alternatives that a client may be disinclined to confront. In presenting advice, a lawyer endeavors to sustain the client’s morale and may put advice in as acceptable a form as honesty permits. However, a lawyer should not be deterred from giving candid advice by the prospect that the advice will be unpalatable to the client.

<sup>151</sup> For an argument that it is in fact a form of “engaged” scholarship, see José E. Alvarez, *A Comment on MacKinnon’s Scholarship*, in *ENGAGED SCHOLARSHIP: CONFRONTING THE WORLD* (forthcoming 2006).

<sup>152</sup> Richard Bilder & Detlev Vagts, *Speaking Law to Power: Lawyers and Torture*, 98 AM. J. INT’L L. 689, 692 n.23 (citing MODEL RULES OF PROF’L CONDUCT R. 2.1 (2004)).

<sup>153</sup> Cf. Memo 28, *supra* note 9, at 374 n.9 (urging careful records to be kept confirming illegal status of those removed) with Geneva IV, *supra* note 14, art. 30 (permitting access to International Red Cross to all protected persons). See also Report of the Special Rapporteur on Torture, *supra* note 40, ¶ 22 (urging abolition of secret places of detention and stating that “it should be a punishable offense for any official to hold a person in a secret and/or unofficial place of detention”); Human Rights Committee, General Comment No. 20, para. 11, U.N. Doc. HRI/GEN/1/Rev.1 (1994) (“To guarantee the effective protection of detained persons, provisions should be made for detainees to be held in places official recognized as places of detention and for their names and places of detention, as well as for the names of persons responsible for their detention, to be kept in registers readily available and accessible to those concerned, including relatives and friends”).

<sup>154</sup> See, e.g., TAGUBA REPORT, *supra* note 123, at 425 (noting that at least in one instance “ghost detainees” had been hidden from the International Committee of the Red Cross); Bacchus, *supra* note 1, at 344-45 (citing media reports from September 2004).

dead of night like those of the Nazis.<sup>155</sup> One would have thought that a memorandum written in March 2004 would also have warned the Attorney General of the potential for more embarrassing revelations by the Red Cross elsewhere should removals be undertaken without enforceable assurances that U.S. personnel, once out of Iraq, or foreign officials where the transfer-ees are ultimately sent, would not maltreat them.<sup>156</sup> One would have thought as well that a memorandum about a treaty provision seeking to prevent Night and Fog-type tactics would have been accurate about describing those tactics and would have warned those tempted by them that "facilitating interrogation" without mechanisms for controlling the abuse of power by the Occupying Power can easily slide into extra-judicial torture and killing.<sup>157</sup>

Further, one would have thought that a memorandum whose first conclusion is premised on ostensible respect for local immigration law and for the principle, drawn from the Hague Regulations, that "an occupying power should maintain and enforce the domestic laws of the country occupied,"<sup>158</sup> would consider whether these are viable or realistic rules in the context of Iraq in March 2004. If the rule that Goldsmith urges is, as he asserts, premised on ensuring "public order and safety,"<sup>159</sup> there should have been some discussion about whether, given concerns for public order and

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<sup>155</sup> See discussion of the ICRC Report *supra* note 121. See also Report of the Special Rapporteur on Torture, *supra* note 40, ¶¶ 51 (discussing the practice of disappearances as a form of torture both for the victim and for the relatives left behind), 52 (discussing the role of torture as a tool to generate terror among the population), 55 (discussing the trauma of being forcibly uprooted). For a summary of the rights of Iraqi detainees under both international humanitarian law as well as the law of human rights, see Leila Nadya Sadat, *International Legal Issues Surrounding the Mistreatment of Iraqi Detainees by American Forces*, ASIL INSIGHTS, May 2004, at 5.

<sup>156</sup> The usual State Department practice wherein it secures "diplomatic assurances" from a state to which transferred detainees are sent that it would not engage in torture, seems plainly inadequate when the state involved is one that the same State Department has branded as a regular practitioner of torture. See *supra* note 126 and accompanying text (list of countries to which we have allegedly sent detainees).

<sup>157</sup> Extra-judicial killings while under U.S. custody appear to have taken place. See Andrew Sullivan, *Atrocities in Plain Sight*, N.Y. TIMES, Jan. 23, 2005, § 7, at 1 ("The Schlesinger panel has officially conceded, although the President has never publicly acknowledged, that American soldiers have tortured five inmates to death. Twenty-three other deaths that occurred during American custody had not been fully investigated by the time the panel issued its report in August."). See also George W. Bush, State of the Union Address (Jan. 28, 2003) (indicating that while "more than 3000 suspected terrorists have been arrested," many others have met a different fate and "are no longer a problem to the United States and our friends and allies"), available at <http://whitehouse.gov/news/releases/2003/01/print/20030128-19.html>. Cf. Report of the Special Rapporteur on Torture, *supra* note 40, ¶ 41 (discussing the minimum assurances that should be in place to pre-empt the resort to torture).

<sup>158</sup> Memo 28, *supra* note 9, at 373.

<sup>159</sup> *Id.* at 373. Cf. Amann, *supra* note 13, at 2124 (noting that the Goldsmith memorandum should have mentioned the "shambled state of the Iraqi legal system").

safety in Iraq, Iraqi immigration rules and procedures were in fact operative, and if they are not, whether the forcible transfer of anyone deemed to be "illegal" by the Occupying Powers could actually undermine public order.<sup>160</sup>

Goldsmith also does not address the United States' success in securing a license from the Security Council that appears to permit it and the United Kingdom, as 'the Authority,' to deviate from the cited Hague principle as necessary to transform Iraqi laws and institutions consistent with respect for democracy and human rights; he also does not address why this deviation was deemed necessary given the perceived human rights flaws in pre-existing Iraqi law and judicial procedures.<sup>161</sup> He also does not tell his client whether the Iraqi immigration law and procedures on which he relies, which were operative during Saddam's regime, conform with human rights norms and respect the protection of all protected persons in occupied territory—consistent with the object and purpose of Geneva IV.<sup>162</sup>

Indeed, Goldsmith evinces a near total lack of curiosity with respect to the fate of those who are suspected of being illegal aliens in pre- or post-occupation Iraq or those who are rounded up for interrogation without being charged with a crime once occupation begins. The relevant Iraqi immigration law and procedures are mentioned in a single paragraph, with no discussion of what these procedures actually consist of, or even whether, given conditions in Iraq in March 2004, these would be applied by U.S. or Iraqi officials.<sup>163</sup> If, as one suspects, at least at the time this memorandum was written Iraqi immigration procedures were in substantial disarray, there is grave doubt about whether the transfer of illegal aliens that Goldsmith claims is legal (or the underlying necessary determination of the legality of

<sup>160</sup> This is particularly a concern to the extent the form in which forcibly removals take place appear, to those left behind, indistinguishable from the policy of disappearances that have been widely condemned for repressive regimes in Latin America. It can safely be assumed that even the appearance that the U.S. engages in such a policy is ruinous for U.S. democratization plans in Iraq and the Middle East region.

<sup>161</sup> See, e.g., Brett H. McGurk, *Revisiting the Law of Nation-Building: Iraq in Transition*, 45 VA. J. INT'L L. 451 (2005) (noting need for reinterpretation of occupation law in context of Iraq); David J. Scheffer, *Beyond Occupation Law*, 97 AM. J. INT'L L. 842 (2003) (discussing the changes to traditional occupation law wrought in the wake of U.N. Security Council Resolution 1483 on Iraq). But see *Will Saddam Hussein Get a Fair Trial?*, 37 CASE W. RES. J. INT'L L. 21, 24 (2005) (Remarks by Professor Curtis Doebbler contending that the United States has not abided by the law of occupation because it has "dissolved the judicial institutions of Iraq, and instated its own judges").

Given these Iraqi-specific developments, it is more than a bit ironic that, at least in terms of applying Article 64 of Geneva IV, Goldsmith applies the strict letter of the treaty, unlike with respect to Article 49. See Memo 28, *supra* note 9, at 374.

<sup>162</sup> Cf. Geneva IV, *supra* note 14, art. 64 (anticipating the repeal or suspension of local laws when these become an obstacle to complying with the convention).

<sup>163</sup> Cf. Memo 28, *supra* note 9, at 374 (mentioning Iraqi Law No. 118 of 1978).

their status) would comport with local or other law at all. Goldsmith does not mention that Geneva law requires that the Red Cross be notified of all detainees, whether or not they are charged with a crime.<sup>164</sup> The same can be said with respect to the procedures (never addressed in Goldsmith's memorandum) for those forcibly removed from Iraq for purposes of interrogation. Is the premise of the memorandum that it is not a violation of Geneva law, international humanitarian law, or international human rights law to forcefully transfer abroad any civilian that an Occupying Power alleges, and itself determines to be an "illegal alien," or other persons that it wants to interrogate, even if local law cannot be given effect and therefore affords such persons no due process?

I accept the proposition that the Rules of Professional Responsibility are a less than reliable guide when it comes to determining whom the "client" is for government attorneys such as those in the Department of Defense. Some argue, with considerable force, that the "ultimate client" in such a case is neither the Secretary of Defense, the Attorney General or even the President, "but the American people," and that therefore government attorneys owe their allegiance, as their oath demands, only to the rule of law or the U.S. constitution.<sup>165</sup> Others suggest that this is overly abstract and the rules presume that the client is a real human being, presumably the official who seeks the advice, with whom the lawyer has a real attorney-client relationship.<sup>166</sup> Others debate the specific role of the OLC. Some contend that lawyers in that office owe a special duty to uphold the law since, as one of the memoranda from Gonzales acknowledges, the OLC's interpretation of all legal issues, both domestic and international, are definitive, at least for the Executive Branch.<sup>167</sup> Others contend that this Office should not

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<sup>164</sup> Cf. Geneva IV, *supra* note 14, arts. 136, 140. The sole indirect reference to these obligations in the Goldsmith memorandum is a footnote recommending that "careful records" be maintained "confirming the illegal status of each alien who is removed under current domestic law." Memo 28, *supra* note 9, at 374 n.9. There is no indication about why such records might be needed or about whether such records need to be made available to anyone, including relatives or the International Red Cross.

<sup>165</sup> See Lawyers' Statement on Bush Administration's Torture Memos (Aug. 4, 2004), available at <http://www.afj.org/spotlight/0804statement.pdf>. See also Koh, *supra* note 13, at 655 (criticizing the torture memoranda because they were written as if the authors' prime obligation was to the President or other Administration superiors but not to the Court (much less the American people)).

<sup>166</sup> See generally Julie Angell, *Ethics, Torture, and Marginal Memoranda at the DOJ Office of Legal Counsel*, 18 GEO. J. LEGAL ETHICS 557, 560-61 (2005).

<sup>167</sup> Memo 7, *supra* note 12, at 119. See also Angell, *supra* note 166, at 564-68.

be a neutral expositor of the law but an advocate for the Executive Branch.<sup>168</sup>

The criticism offered here does not require solving these conundrums. Even if we assume that the clients in these cases are the executive branch officials who sought the advice and not the American people, the rules of professional responsibility anticipate a competent, objective, candid, and honest assessment of the relevant law, along with a fulsome consideration of the moral, economic, social and political context in which the lawyers' advice is sought and will be received. And even assuming that OLC lawyers cannot or should not act as impartial arbitrators of the law as if they were Article III judges, those lawyers should, consistent with serving the executive branch and furthering its policies, provide a competent and thorough view of the law, particularly when their advice is sought in confidence and when its subject includes, at least in part, contemplated future action that might run afoul of the law.<sup>169</sup> Of course, every lawyer, in and out of government, cannot ethically counsel clients "to engage, or assist a client, in conduct that the lawyer knows is criminal" and should warn their clients of the possibility of adverse consequences.<sup>170</sup>

### VIII. CONCLUSION

The U.N. Charter's human rights provisions, the Geneva Conventions, the Nuremberg Trials, the Torture Convention, and the other foundational documents of the international bill of rights, including the Universal Declaration of Human Rights and the ICCPR, have a special status. They are regarded as the constitutive instruments of modern international law for

<sup>168</sup> See Randolph D. Moss, *Executive Branch Legal Interpretation: A Perspective from the Office of Legal Counsel*, 52 ADMIN. L. REV. 1303 (2000) (describing both models but leaning towards the neutral expositor role).

<sup>169</sup> By focusing on the responsibility of lawyers, I do not intend to suggest that their clients hold no corresponding responsibilities. Government clients have a duty to seek the advice of lawyers *prior* to taking legally dubious and especially potentially criminal action, especially since illegal activity on their part will not only reflect on themselves but on the nation. It need scarcely be said that in doing so, they should not attempt to defeat the purpose of seeking legal advice by restricting the lawyer's role to providing merely yes and no responses to unduly narrow inquiries. Clients need to enable their lawyers to provide the fulsome legal advice anticipated in Rule 2.1. See *supra* notes 150-52 and accompanying text.

<sup>170</sup> MODEL RULES OF PROF'L CONDUCT R. 1.2(d) (2004). But "a lawyer may discuss the legal consequences of any proposed course of conduct with a client and may counsel or assist a client to make a good faith effort to determine the validity, scope, meaning or application of the law." *Id.* I leave to experts in professional responsibility the question of whether any of the torture memoranda violated Rule 1.2(d).

Coercive interrogation techniques may also implicate the ethical responsibilities of other professions involved. See, e.g., M. Gregg Bloche & Jonathan H. Marks, *When Doctors Go to War*, 352 NEW ENG. J. MED. 3 (2005) (discussing the tensions between the Hippocratic ethical tradition and the use of medical professionals to assist in coercive interrogation).



good reason. They marked a transition from using public international law to address only inter-state problems to using this law to protect the dignity and life of the individual—regardless of whether the individual is a legal or illegal alien, a lawful or unlawful combatant, or a mere “inhabitant” of occupied territory. Nuremberg made clear, in addition, that these obligations were so essential that violations of certain of them would be criminalized; that is, that individuals, no matter their status, would henceforth be held criminally accountable, that certain international crimes were universally abhorred, and that it would not be a defense from criminal liability to point to national law of any kind—whether or not this law purported to have “constitutional” status, addressed the executive branch, or governed the military. These developments, which the United States helped to forge after the horrors of a world war, legitimized the use of international legal discourse to address issues that all too often had been banished from legal discourse altogether.

The Bush Administration’s torture memoranda are a massive retrograde step wherein those sources of international obligation that are not ignored or relegated to mere considerations of “policy” are mangled beyond recognition.<sup>171</sup> The memoranda writers torture the foundational instruments of modern international law, presumably for policy ends. They attempt to return us to an age when international law protected only the perceived needs of certain states as determined by the states themselves. To the extent the memoranda excuse torture or inhuman treatment when it occurs outside U.S. territory or is committed by foreigners with U.S. acquiescence, it returns us to a dark period when colonial powers renounced torture for their citizens while deploying it on those whom they called, with no sense of irony, the “uncivilized.”<sup>172</sup> As appears increasingly obvious, the memoranda, and the acts that they are believed to have inspired, have gravely damaged U.S. foreign policy interests, including the war on terrorism, as well as U.S. claims to be seeking to advance the rule of law, particularly within Iraq and the rest of the Middle East.

I understand well the conditions under which these memoranda were produced. During my time as a lawyer in the Legal Adviser’s office of the U.S. Department of State, there were considerable pressures to produce “can do” memoranda on a variety of topics. I can also understand the frustration of those who produced these memoranda under such pressures only to have their conclusions, never intended to be made public, scrutinized by

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<sup>171</sup> For some discomfiting parallels, consider the way Nazi lawyers and officials disparaged international law and sought to evade treaty commitments. See, e.g., Detlev Vagts, *International Law in the Third Reich*, 84 AM. J. INT’L L. 661, 690-93, 696-99 (1990).

<sup>172</sup> See, e.g., Ian Brownlie, *Interrogation in Depth: The Compton and Parker Reports*, 35 Mod. L. Rev. 501 (1972) (discussing the use of these techniques in Kenya, Cyprus, Palestine, Aden, British Cameroon, and Malaya).

law professors with the luxury of time and research assistants. Yet the notorious history of Nazi lawyers who “prostitut[ed] . . . a judicial system for the accomplishment of criminal ends”<sup>173</sup> hangs over us all. The debate over these memoranda is not the usual one among academics advancing competing or distinct views of the law. As the *Altstoetter* case demonstrates, when government lawyers torture the rule of law as gravely as they have done here, international as well as national crimes may have been committed, including by the lawyers themselves.<sup>174</sup> Once such memoranda become public it became the duty of all of us, government lawyer, private citizen, and law professor alike, not to let their authors off the hook, to closely look at the conclusions reached, and to consider what our government is alleged to have done, and is perhaps continuing to do, in their wake.<sup>175</sup> If we do not, we risk becoming complicit in the torture of human beings as well as the law.

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<sup>173</sup> Bilder & Vagts, *supra* note 152, at 694 (quoting the *Altstoetter* judgment).

<sup>174</sup> As previously noted, the *Altstoetter* judgment considered and rejected the contention, raised by the accused Minister of Justice Schlegelberger that his actions prevented even graver abuses that would have been committed by the “lawless forces under Hitler and Himmler.” *Altstoetter*, *supra* note 20, at 1086.

<sup>175</sup> Continuing scrutiny of these memoranda may also serve notice as to gaps in U.S. laws. See *supra* note 136 (noting gaps in U.S. law on non-refoulement). Cf. Torture Outsourcing Prevention Act, H.R. 952, 109th Cong. (2005) (seeking to prevent extra-judicial renditions to places known to engage in torture); Laura A. Dickinson, *Public Law Values in a Privatized World*, 35 YALE J. INT’L L. (forthcoming 2006) (proposing changes in government contracts to make private contractors used by the U.S. military more accountable).

